TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 491.

GREAT NORTHERN RAILWAY COMPANY, PETITIONER,

vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FOR CERTIORARI FILED OCTOBER 28, 1907.
CERTIORARI AND RETURN FILED DECEMBER 6, 1907.

(20,894.)

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INDEX.

	Original.	Print.
ption	*a*	1
nscript from the district court of the United States for the district of Minnesota	1	1
Caption	1	1
Indictment	1	1
Record entry of arraignment of defendants	26	24
Demurrer to indictment	27	25
Record entry of hearing on demurrer to indictment, December 13, 1906	28	26
Order of submission of demurrer to indictment	29	26
Order overruling demurrer to indictment, January 26, 1907	29	26
Memorandum as to Judge Lochren's views	31	29
Opinion of Judge Morris on demurrer to indictment	32	29
Order overruling demurrer to indictment and exception thereto	52	47
Order: Cause continued	53	47
Order vacating order of continuance	53	48
Record entry of plea of defendants	54	48
Order: Cause continued	54	48
Order granting separate trial to defendants Benjaman Campbell *et al*	54	49
Verdict and judgment, April 6, 1907	55	50

JDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 10, 1907.

	Original.	Print.
Bill of exceptions	56	51
Agreement for trial as to the railway company only	57	51
Objection to introduction of any evidence	57	51
Ruling on objection to introduction of any evidence and exception thereto	58	52
Agreement as to admissions of fact by defendant	58	52
Defendant's admissions	58	52
Motion to instruct jury to return verdict for defendant	60	54
Ruling on motion for instructed verdict and exception thereto	61	54
Charge to the jury and exception thereto	61	54
Grounds of defendant's exception to the charge	61	55
Motion in arrest of judgment	62	55
Ruling on motion in arrest of judgment and exception thereto	62	55
Stipulation as to bill of exceptions	63	56
Certificate of judge that record contains all of the evidence, etc	63	57
Petition for writ of error	64	57
Assignment of errors	65	58
Order allowing writ of error, etc	66	59
Supersedeas bond	67	60
Citation and admission of service	69	62
Writ of error and clerk's return	70	63
Clerk's certificate to transcript	71	64
Clerk's certificate to printed record	73	64
Caption to supplemental transcript of proceedings in United States circuit court of appeals	74	65
Appearance of counsel for plaintiff in error	75	65
Appearance of counsel for defendant in error	75	66
Argument commenced	76	66
Order of submission	76	67
Opinion of United States circuit court of appeals	78	67
Judgment of United States circuit court of appeals	100	89
Clerk's certificate to supplemental transcript of proceedings	101	90
Stipulation as to return to writ of certiorari	102	90
Writ of certiorari	103	91
Return to writ of certiorari	105	91

a (Certified.)

Transcript of Record.

United States Circuit Court of Appeals, Eighth Circuit.

No. 2603.

GREAT NORTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
THE UNITED STATES, Defendant in Error.

In Error to the District Court of the United States for the District of Minnesota.

Filed April 13, 1907.

1 United States District Court, District of Minnesota, Fourth Division.

No. 3619.

THE UNITED STATES, Plaintiff,
against
GREAT NORTHERN RAILWAY COMPANY, BENJAMIN CAMPBELL, WILLIAM W. BROUGHTON, and GUY I. SWENEY.

Be it Remembered, that at the October Term, A. D. 1906, of the United States District Court for the District of Minnesota, Fourth Division, begun and held at Minneapolis, in said District on the first Tuesday in October, being the second day of October, A. D. 1906, the Grand Jury of the United States within and for said District, and Division, on the 8th day of November, A. D. 1906, came into open Court and presented their True Bill of Indictment against the Great Northern Railway Company, a corporation, B. Campbell, W. W. Broughton and G. I. Sweney, which said indictment was filed in the above entitled action on said 8th day of November, A. D. 1906, and is in the words and figures following, to-wit:

The District Court of the United States of America for the District of Minnesota, Fourth Division.

At a stated term of the District Court of the United States of America for the District of Minnesota, begun and held at the City of Minneapolis within and for the District and Division aforesaid, on the first Tuesday in October, being the Second day of October, in the year of our Lord one thousand nine hundred and six by a duly empanelled, charged and sworn Grand Jury of the United States of America within and for said District and Division, it is presented in manner and form following, that is to say:

UNITED STATES OF AMERICA,
District of Minnesota, Fourth Division, sct:

The Grand Jurors of the United States of America within and for said District and Division, in the name and by the authority of the said United States of America, upon their oaths present, that before and at all times hereinafter mentioned in this count and each of the several counts of this indictment, the Great Northern Railway Company was a corporation duly organized, created and existing under and by virtue of the laws of the state of Minnesota, and during all of said times was a common carrier engaged in the
2 transportation of property wholly by railroad, in interstate commerce, over its railway route, that is to say: from the city of Minneapolis, in the county of Hennepin, state of Minnesota, in and through the Fourth Division of the District of Minnesota, through the states of Minnesota, North Dakota, Montana and Idaho, to the cities of Spokane, Seattle and Bellingham, in the state of Washington, and so was a corporation common carrier, subject to the provisions of the Act of Congress approved February 4, 1887, entitled "An Act to regulate commerce," and also to the Acts amendatory thereof, up to and including the Act entitled "An Act to further regulate commerce with foreign nations and among the states," approved February 19, 1903; that before and at all times mentioned in this and the subsequent counts of this indictment, the W. P. Devereux Company was a corporation duly organized, created and existing under and by virtue of the laws of the state of Minnesota; that before and at all times mentioned in this and each of the subsequent counts of this indictment, one B. Campbell, whose true Christian name is to the Grand Jurors unknown, was an officer and agent of and a person acting for and employed by the said Great Northern Railway Company, that is to say: the Fourth Vice President of the said corporation, the Great Northern Railway Company; that before and at all times mentioned in this and each of the subsequent counts of this indictment, one W. W. Broughton, whose true Christian name is to the Grand Jurors unknown, was an officer and agent of and a person acting for and employed by the said Great Northern Railway Company, that is to say: Freight Traffic Manager of the said corporation, the Great Northern Railway Company; that before and at all times mentioned in this and the subsequent counts of this indictment, one G. I. Sweney, whose true Christion names is to the Grand Jurors unknown, was an officer and agent of and a person acting for and employed by the said corporation, the Great Northern Railway Company, that is to say: Assistant General Freight Agent of the said corporation, the Great Northern Railway Company; that at the said city of Minneapolis, in the state of Minnesota, on or about the thirty-first day of July, 1905, the said W. P. Devereux Company did deliver to the said Great Northern Railway Company, for transportation in interstate commerce by the said common carrier over its route aforesaid, to the said city of Seattle, in the state of Washington, certain property, to-wit: one (1) carload of oats of the net weight of forty-seven thousand four hundred sixty pounds (47460#), and the said common carrier did forthwith, upon

and in pursuance of such delivery of said property, transport the same by interstate commerce from the said city of Minneapolis aforesaid, over its said route, through and beyond the Fourth
3 Division of the said District of Minnesota, to the said city of Seattle, Washington, aforesaid, in car No. 15664, under waybill No. 4061; that there had theretofore been published and filed by the said common carrier with the Interstate Commerce Commission of the United States, as required by law, certain tariffs, rates and schedules showing the legal rates and charges established by the said common carrier for the transportation of the property aforesaid between the points aforesaid, and in force at the time upon its said route, copies of which tariffs and schedules are too voluminous to be herein set forth in full; that said tariffs were then and there on file with the Interstate Commerce Commission of the United States, as required by law; that said tariffs, rates and schedules, so made, published and filed with the Interstate Commerce Commission of the United States, as aforesaid, showed that the legal rates and charges established for the transportation of said property over the said railroad, from the said city of Minneapolis, in the state of Minnesota, to the said city of Seattle, in the state of Washington, as aforesaid, upon the date aforesaid, was fifty cents (50c.) for each one hundred pounds (100#) of the said property so transported, but the Grand Jurors aforesaid, on their oath aforesaid, do present and charge that at the said city of Minneapolis, Minnesota, in the said Fourth Division of the District of Minnesota, and within the jurisdiction of this court, on the said thirty-first day of July, 1905, the said Great Northern Railway Company, the said B. Campbell, the said W. W. Broughton and the said G. I. Sweney, officers and agents of the said Great Northern Railway Company, as aforesaid, did unlawfully grant and give to the said W. P. Devereux Company, corporation as aforesaid, a concession of twenty cents (20c.) of the said freight rate, as aforesaid, upon every one hundred pounds (100#) of the property so transported by the said common carrier, as aforesaid, whereby the said property was by said corporation common carier transported in said interstate commerce from the said city of Minneapolis to the said city of Seattle, by the route and in the manner aforesaid, at a less compensation and rate than that named therefor in the said tariffs and schedules so as aforesaid published and filed by the said common carrier and in force at the time upon its said route, and which were then and there on file with the Interstate Commerce Commission of the United States, as required by law; that they, the said B. Campbell, the said W. W. Broughton, and the said G. I. Sweney, agents and officers of the said Great Northern Railway Company, as aforesaid, were then and there, in all things, acting as aforesaid for and in behalf of the Great Northern Railway Company within the scope of their respective employments;
4 which is against the peace and dignity of the United States, and contrary to the form of the statute in such case made and provided.

Second Count.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present that before and during all the times mentioned in this second count of this indictment, the said Great Northern Railway Company was a corporation, and a corporation common carrier operating its said railroad as in the first count of this indictment set forth and alleged, and one subject to the provisions of the Acts of Congress in that count mentioned; that during all of said time the W. P. Devereux Company was a corporation as set forth in the first count of this indictment, and the said B. Campbell, the said W. W. Broughton, and the said G. I. Sweney were officers and agents of the said Great Northern Railway Company as set forth in said first count of this indictment; that at the said city of Minneapolis, in the state of Minnesota on or about the third day of August, 1905, the said W. P. Devereux Company did deliver to the said Great Northern Railway Company, for transportation in interstate commerce by the said common carrier over its route aforesaid, to the said city of Seattle, in the state of Washington, certain property, to wit: one (1) carload of oats of the net weight of forty thousand pounds (40000#), and the said common carrier did forthwith, upon and in pursuance of such delivery of said property, transport the same by interstate commerce from the said city of Minneapolis aforesaid, over its said route, through and beyond the Fourth Division of the said District of Minnesota, to the said city of Seattle, Washington, aforesaid, in car No. 8608, under way-bill No. 276; that there had theretofore been published and filed by the said common carrier with the Interstate Commerce Commission of the United States, as required by law, certain tariffs, rates and schedules showing the legal rates and charges established by the said common carrier for the transportation of the property aforesaid between the points aforesaid, and in force at the time upon its said route, copies of which tariffs and schedules are too voluminous to be herein set forth in full; that said tariffs were then and there on file with the Interstate Commerce Commission of the United States, as required by law; that said tariffs, rates and schedules, so made, published and filed with the Interstate Commerce Commission of the United States, as aforesaid, showed that the legal rates and charges established for the transportation of said property over the said railroad, from the said city of Minneapolis, in the state of Minnesota, to the said city of Seattle, in the state of Washington, as aforesaid, upon the date aforesaid, was fifty cents (50c.) for each one hundred pounds (100#) of the said property so transported, but the Grand
5 Jurors aforesaid, on their oath aforesaid, do present and charge that at the said city of Minneapolis, Minnesota, in the said Fourth Division of the District of Minnesota, and within the jurisdiction of this Court, on the said third day of August, 1905, the said Great Northern Railway Company, the said B. Campbell, the said W. W. Broughton and the said G. I. Sweney, officers and agents of the said Great Northern Railway Company, as afore-

said, did unlawfully grant and give to the said W. H. Devereux Company, corporation as aforesaid, a concession of twenty cents (20c.) of the said freight rate, as aforesaid, upon every one hundred pounds (100#) of the property so transported by the said common carrier, as aforesaid, whereby the said property was by said corporation common carrier transported in said interstate commerce from the said city of Minneapolis to the said city of Seattle, by the route and in the manner aforesaid, at a less compensation and rate than that named therefor in the said tariffs and schedules so as aforesaid published and filed by the said common carrier and in force at the time upon its said route, and which were then and there on file with the Interstate Commerce Commission of the United States, as required by law; that they, the said B. Campbell, the said W. W. Broughton, and the said G. I. Sweney, agents and officers of the Great Northern Railway Company, as aforesaid, were then and there, in all things, acting as aforesaid for and in behalf of the Great Northern Railway Company within the scope of their respective employments; which is against the peace and dignity of the United States, and contrary to the form of the statute in such case made and provided.

Third Count.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present that before and during all the times mentioned in this third count of this indictment, the said Great Northern Railway Company was a corporation, and a corporation common carrier operating its said railroad as in the first count of this indictment set forth and alleged, and one subject to the provisions of the Acts of Congress in that count mentioned; that during all of said time the W. P. Devereux Company was a corporation as set forth in the first count of this indictment, and the said B. Campbell, the said W. W. Broughton, and the said G. I. Sweney were officers and agents of the said Great Northern Railway Company as set forth in the said first count of this indictment; that at the said city of Minneapolis, in the state of Minnesota, on or about the third day of August, 1905, the said W. P. Devereux Company did deliver to the said Great Northern Railway Company, for transportation in interstate commerce by the said common carrier over its route
6 aforesaid, to the said city of Seattle, in the state of Washington, certain property, to wit: one (1) carload of oats of the net weight of sixty thousand pounds (60000#), and the said common carrier did forthwith, upon and in pursuance of such delivery of said property, transport the same by interstate commerce from the said city of Minneapolis aforesaid, over its said route, through and beyond the Fourth Division of the said District of Minnesota, to the said city of Seattle, Washington, aforesaid, in car No. 21380, under way-bill No. 271; that there had theretofore been published and filed by the said common carrier with the Interstate Commerce Commission of the United States, as required by law, certain tariffs, rates and schedules showing the legal rates and charges established

by the said common carrier for the transportation of the property aforesaid between the points aforesaid, and in force at the time upon its said route, copies of which tariffs and schedules are too voluminous to be herein set forth in full; that said tariffs were then and there on file with the Interstate Commerce Commission of the United States, as required by law; that said tariffs, rates and schedules, so made, published and filed with the Interstate Commerce Commission of the United States, as aforesaid, showed that the legal rates and charges established for the transportation of said property over the said railroad, from the said city of Minneapolis, in the State of Minnesota, to the said city of Seattle, in the State of Washington, as aforesaid, upon the date aforesaid, was fifty cents (50c.) for each one hundred pounds (100#) of the said property so transported, but the Grand Jurors aforesaid, on their oath aforesaid, do present and charge that at the said city of Minneapolis, Minnesota, in the said Fourth Division of the District of Minnesota, and within the jurisdiction of this Court, on the said third day of August, 1905, the said Great Northern Railway Company, the said B. Campbell, the said W. W. Broughton and the said G. I. Sweney, officers and agents of the said Great Northern Railway Company, as aforesaid, did unlawfully grant and give to the said W. P. Devereux Company, corporation as aforesaid, a concession of twenty cents (20c.) of the said freight rate, as aforesaid, upon every one hundred pounds (100#) of the property so transported by the said common carrier, as aforesaid, whereby the said property was by said corporation common carrier, transported in said interstate commerce from the said city of Minneapolis to the said city of Seattle, by the route and in the manner aforesaid, at a less compensation and rate than that named therefor in the said tariffs and schedules so as aforesaid published and filed by the said common carrier and in force at the time upon its said route, and which were then and there on file with the Interstate Commerce Commission of the United States, as required by law; that they, the said B. Campbell, the said W. W.
7 Broughton, and the said G. I. Sweney, agents and officers of the said Great Northern Railway Company, as aforesaid, were then and there, in all things, acting for and in behalf of the Great Northern Railway Company within the scope of their respective employments; which is against the peace and dignity of the United States, and contrary to the form of the statute in such case made and provided.

Fourth Count.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present that before and during all the times mentioned in this fourth count of this indictment, the said Great Northern Railway Company was a corporation, and a corporation common carrier operating its said railroad as in the first count of this indictment set forth and alleged, and one subject to the provisions of the Acts of Congress in that count mentioned; that during all of said time the W. P. Devereux Company was a corporation as set forth in the

first count of this indictment, and the said B. Campbell, the said W. W. Broughton, and the said G. I. Sweney were officers and agents of the said Great Northern Railway Company as set forth in the said first count of this indictment; that at the said city of Minneapolis, in the state of Minnesota, on or about the third day of August, 1905, the said W. P. Devereux Company did deliver to the said Great Northern Railway Company, for transportation in interstate commerce by the said common carrier over its route aforesaid, to the said city of Seattle, in the state of Washington, certain property, to-wit; one (1) carload of oats of the net weight of forty thousand pounds (40000#), and the said common carrier did forthwith, upon and in pursuance of such delivery of said property, transport the same by interstate commerce, from the said city of Minneapolis aforesaid, over its said route, through and beyond the Fourth Division of the said District of Minnesota, to the said city of Seattle, Washington, aforesaid, in car No. 5870, under way-bill No. 275; that there had theretofore been published and filed by the said common carrier with the Interstate Commerce Commission of the United States, as required by law, certain tariffs, rates and schedules showing the legal rates and charges established by the said common carrier for the transportation of the property aforesaid between the points aforesaid, and in force at the time upon its said route, copies of which tariffs and schedules are too voluminous to be herein set forth in full; that said tariffs were then and there on file with the Interstate Commerce Commission of the United States, as required by law; that said tariffs, rates and schedules, so made, published and filed with the Interstate Commerce Commission of the United
8 States, as aforesaid, showed that the legal rates and charges established for the transportation of said property over the said railroad, from the said city of Minneapolis, in the state of Minnesota, to the said city of Seattle, in the state of Washington, as aforesaid, upon the date aforesaid, was fifty cents (50c.) for each one hundred pounds (100#) of the said property so transported, but the Grand Jurors aforesaid, on their oath aforesaid, do present and charge that at the said city of Minneapolis, Minnesota, in the said Fourth Division of the District of Minnesota, and within the jurisdiction of this Court, on the said third day of August, 1905, the said Great Northern Railway Company, the said B. Campbell, the said W. W. Broughton and the said G. I. Sweney, officers and agents of the said Great Northern Railway Company, as aforesaid, did unlawfully grant and give to the said W. P. Devereux Company, corporation as aforesaid, a concession of twenty cents (20c.) of the said freight rate, as foresaid, upon every one hundred pounds (100#) of the property so transported by the said common carrier, as aforesaid, whereby the said property was by said corporation common carrier transported in said interstate commerce from the said city of Minneapolis to the said city of Seattle, by the route and in the manner aforesaid, at a less compensation and rate than that named therefor in the said tariffs and schedules so as aforesaid published and filed by the said common carrier and in force at the time upon its said route, and which were then and there on file with the Inter-

state Commerce Commission of the United States, as required by law; that they, the said B. Campbell, and said W. W. Broughton, and the said G. I. Sweney, agents and officers of the said Great Northern Railway Company, as aforesaid, were then and there, in all things, acting as aforesaid for and in behalf of the Great Northern Railway Company within the scope of their respective employments; which is against the peace and dignity of the United States, and contrary to the form of the statute in such case made and provided.

Fifth Count.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present that before and during all the times mentioned in this fifth count of this indictment, the said Great Northern Railway Company was a corporation, and a corporation common carrier operating its said railroad as in the first count of this indictment set forth and alleged, and one subject to the provisions of the Acts of Congress in that count mentioned; that during all of said time the W. P. Devereux Company was a corporation as set forth in the first count of this indictment, and the said B. Campbell, the said W. W.
9 Broughton, and the said G. I. Sweney were officers and agents of the said Great Northern Railway Company as set forth in the said first count of this indictment; that at the said city of Minneapolis in the state of Minnesota on or about the twenty-first day of June, 1905, the said W. P. Devereux Company did deliver to the said Great Northern Railway Company, for transportation in interstate commerce by the said common carrier over its route aforesaid, to the said city of Spokane, in the state of Washington, certain property, to-wit; one carload of oats of the net weight of seventy thousand three hundred forty pounds (70340#), and the said common carrier did forthwith, upon and in pursuance of such delivery of said property, transport the same by interstate commerce from the said city of Minneapolis, aforesaid, over its said route, through and beyond the Fourth Division of the said District of Minnesota, to the said city of Spokane, Washington, aforesaid, in car No. 32420, under way-bill No. 2603; that there had theretofore been published and filed by the said common carrier with the Interstate Commerce Commission of the United States, as required by law, certain tariffs, rates and schedules showing the legal rates and charges established by the said common carrier for the transportation of the property aforesaid between the points aforesaid and in force at the time upon its said route, copies of which tariffs and schedules are too voluminous to be herein set forth in full; that said tariffs were then and there on file with the Interstate Commerce Commission of the United States, as required by law; that said tariffs, rates and schedules, so made, published and filed with the Interstate Commerce Commission of the United States, as aforesaid, showed that the legal rates and charges established for the transportation of said property over the said railroad, from the said city of Minneapolis, in the state of Minnesota, to the said city of Spokane, in the state of Washington, as aforesaid, upon the date aforesaid, was

fifty cents (50c.) for each one hundred pounds (100#) of the said property so transported, but the Grand Jurors aforesaid, on their oath aforesaid, do present and charge that at the said city of Minneapolis, Minnesota, in the said Fourth Division of the District of Minnesota, and within the jurisdiction of this Court, on the said twenty-first day of June, 1905, the said Great Northern Railway Company, the said B. Campbell, the said W. W. Broughton and the said G. I. Sweney, officers and agents of the said Great Northern Railway Company, as aforesaid, did unlawfully grant and give to the said W. P. Devereux Company, corporation as aforesaid, a concession of eighteen cents (18c.) of the said freight rate, as aforesaid, upon every one hundred pounds (100#) of the property so transported by the said common carrier as aforesaid, whereby the said property was by said corporation common carrier transported in said interstate commerce from the said city of Minneapolis to the said city of Spokane, by the route and in the manner aforesaid, at a less compensation and rate than that named therefor in the said tariffs and schedules so as aforesaid published and filed by the said common carrier and in force at the time upon its said route, and which were then and there on file with the Interstate Commerce Commission of the United States, as required by law; that they, the said B. Campbell, the said W. W. Broughton, and the said G. I. Sweney, agents and officers of the said Great Northern Railway Company, as aforesaid, were then and there, in all things, acting as aforesaid for and in behalf of the Great Northern Railway Company within the scope of their respective employments; which is against the peace and dignity of the United States, and contrary to the form of the statute in such case made and provided.

Sixth Count.

And the Grand Jurors aforesaid, upon their oath aforesaid, do, further present that before and during all the times mentioned in this sixth count of this indictment, the said Great Northern Railway Company was a corporation, and a corporation common carrier operating its said railroad as in the first count of this indictment set forth and alleged, and one subject to the provisions of the Acts of Congress in that count mentioned; that during all of said time the W. P. Devereux Company was a corporation as set forth in the first count of this indictment, and the said B. Campbell, the said W. W. Broughton, and the said G. I. Sweney were officers and agents of the said Great Northern Railway Company as set forth in said first count of this indictment; that at the said city of Minneapolis, in the state of Minnesota, on or about the twenty-third day of May, 1905, the said W. P. Devereux Company did deliver to the said Great Northern Railway Company, for transportation in interstate commerce by the said common carrier over its route aforesaid, to the said city of Seattle, in the state of Washington, certain property, to-wit: one (1) carload of corn of the net weight of sixty thousand pounds (60000#), and the said common carrier did forthwith, upon and in pursuance of such delivery of said property, transport

the same by interstate commerce from the said city of Minneapolis aforesaid, over its said route, through and beyond the Fourth Division of the said District of Minnesota, to the said city of Seattle, Washington, aforesaid, in car No. 73898, under way-bill No. 2301; that there had theretofore been published and filed by the said common carrier with the Interstate Commerce Commission of the United States, as required by law, certain tariffs, rates and
11 schedules showing the legal rates and charges established by the said common carrier for the transportation of the property aforesaid between the points aforesaid, and in force at the time upon its said route, copies of which tariffs and schedules are too voluminous to be herein set forth in full; that said tariffs were then and there on file with the Interstate Commerce Commission of the United States, as required by law; that said tariffs, rates and schedules, so made, published and filed with the Interstate Commerce Commission of the United States, as aforesaid, showed that the legal rates and charges established for the transportation of said property over the said railroad, from the said city of Minneapolis, in the state of Minnesota, to the said city of Seattle, in the state of Washington, as aforesaid, upon the date aforesaid was fifty cents (50c.) for each one hundred pounds (100#) of the said property so transported, but the Grand Jurors aforesaid, on their oath aforesaid, do present and charge that at the said city of Minneapolis, Minnesota, in the said Fourth Division of the District of Minnesota, and within the jurisdiction of this Court, on the said twenty-third day of May, 1905, the said Great Northern Railway Company, the said B. Campbell, the said W. W. Broughton and the said G. I. Sweney, officers and agents of the said Great Northern Railway Company, as aforesaid, did unlawfully grant and give to the said W. P. Devereux Company, corporation as aforesaid, a concession of fifteen cents (15c.) of the said freight rate, as aforesaid, upon every one hundred pounds (100#) of the property so transported by the said common carrier, as aforesaid, whereby the said property was by said corporation common carrier transported in said interstate commerce from the said city of Minneapolis to the said city of Seattle, by the route and in the manner aforesaid, at a less compensation and rate than that named therefor in the said tariffs and schedules so as aforesaid published and filed by the said common carrier and in force at the time upon its said route, and which were then and there on file with the Interstate Commerce Commission of the United States as required by law; that they, the said B. Campbell, the said W. W. Broughton, and the said G. I. Sweney, agents and officers of the Great Northern Railway Company, as aforesaid, were then and there, in all things acting as aforesaid for and in behalf of the Great Northern Railway Company within the scope of their respective employments; which is against the peace and dignity of the United States, and contrary to the form of the statute in such case made and provided.

Seventh Count.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present that before and during all the times men-
12 tioned in this seventh count of this indictment, the said Great Northern Railway Company was a corporation, and a corporation common carrier operating its said railroad as in the first count of this indictment set forth and alleged, and one subject to the provisions of the Acts of Congress in that count mentioned; that during all of said time the W. P. Devereux Company was a corporation as set forth in the first count of this indictment, and the said B. Campbell, the said W. W. Broughton and the said G. I. Sweney were officers and agents of the said Great Northern Railway Company as set forth in said first count of this indictment; that at the said city of Minneapolis, in the state of Minnesota, on or about the twentieth day of May, 1905, the said W. P. Devereux Company did deliver to the said Great Northern Railway Company, for transportation in interstate Commerce by the said common carrier over its route aforesaid, to the said city of Spokane, in the state of Washington, certain property, to-wit: one (1) carload of oats of the net weight of seventy-two thousand three hundred twenty pounds (72320#), and the said common carrier did forthwith, upon and in pursuance of such delivery of said property, transport the same by interstate commerce from the said city of Minneapolis aforesaid, over its said route, through and beyond the Fourth Division of the said District of Minnesota, to the said city of Spokane, Washington, aforesaid, in car No. 30146, under way-bill No. 2102; that there had theretofore been published and filed by the said common carrier with the Interstate Commerce Commission of the United States, as required by law, certain tariffs, rates and schedules showing the legal rates and charges established by the said common carrier for the transportation of the property aforesaid between the points aforesaid, and in force at the time upon its said route, copies of which tariffs and schedules are too voluminous to be herein set forth in full; that said tariffs were then and there on file with the Interstate Commerce Commission of the United States, as required by law; that said tariffs, rates and schedules, so made, published and filed with the Interstate Commerce Commission of the United States, as aforesaid, showed that the legal rates and charges established for the transportation of said property over the said railroad, from the said city of Minneapolis, in the state of Minnesota, to the said city of Spokane, in the state of Washington, as aforesaid, upon the date aforesaid, was fifty cents (50c.) for each one hundred — (100#) of the said property so transported, but the Grand Jurors aforesaid, on their oath aforesaid, do present and charge that at the said city of Minneapolis, Minnesota, in the said Fourth Division of the District of Minnesota, and within the jurisdiction of this Court, on the said twentieth day of May, 1905, the said Great Northern Railway Company, the said B. Campbell, the said W. W. Broughton and
13 the said G. I. Sweney, officers and agents of the said Great Northern Railway Company, as aforesaid, did unlawfully

grant and give to the said W. P. Devereux Company, a corporation, as aforesaid, a concession of fifteen cents (15c.) of the said freight rate, as aforesaid, upon every one hundred pounds (100#) of the property so transported by the said common carrier, as aforesaid, whereby the said property was by said corporation common carrier transported in said interstate commerce from the said city of Minneapolis to the said city of Spokane, by the route and in the manner aforesaid, at a less compensation and rate than that named therefor in the said tariffs and schedules so as aforesaid published and filed by the said common carrier and in force at the time upon its said route, and which were then and there on file with the Interstate Commerce Commission of the United States, as required by law; that they, the said B. Campbell, the said W. W. Broughton, and the said G. I. Sweney, agents and officers of the Great Northern Railway Company, as aforesaid, were then and there, in all things, acting as aforesaid for and in behalf of the Great Northern Railway Company within the scope of their respective employments; which is against the peace and dignity of the United States, and contrary to the form of the statute in such case made and provided.

Eighth Count.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present that before and during all the times mentioned in this eighth count of this indictment, the said Great Northern Railway Company was a corporation, and a corporation common carrier operating its said railroad as in the first count of this indictment set forth and alleged, and one subject to the provisions of the Acts of Congress in that count mentioned; that during all of said time the W. P. Devereux Company was a corporation as set forth in the first count of this indictment, and the said B. Campbell, the said W. W. Broughton and the said G. I. Sweney, were officers and agents of the said Great Northern Railway Company as set forth in the first count of this indictment; that at said city of Minneapolis, in the state of Minnesota, on or about the seventeenth day of May, 1905, the said W. P. Devereux Company did deliver to the said Great Northern Railway Company, for transportation in interstate commerce by the said common carrier over its route aforesaid, to the said city of Spokane, Washington, certain property, to-wit: one (1) carload of oats of the net weight of fifty-eight thousand nine hundred sixty pounds (58960#), and the said common carrier did forthwith upon and in pursuance of such delivery of said property, transport the same by interstate commerce from said city of Min-
14 neapolis, Minnesota, aforesaid, over its said route, through and beyond the Fourth Division of the said District of Minnesota to the said City of Spokane, Washington, aforesaid, in car No. 19110 under way-bill No. 1789; that there had theretofore been published and filed by the said common carrier with the Interstate Commerce Commission of the United States, as required by law, certain tariffs, rates and schedules showing the legal rates and charges established by the said common carrier for the transportation of the property aforesaid between the points aforesaid, and in force at the time

upon its raid route; copies of which tariffs and schedules are too voluminous to be herein set forth in full; that said tariffs were then and there on file with the Interstate Commerce Commission of the United States, as required by law; that the said tariffs, rates and schedules, so made, published and filed with the Interstate Commerce Commission of the United States, as aforesaid, showed that the legal rates and charges established for the transportation of said property over the said railroad, from the said city of Minneapolis, in the state of Minnesota, to the said city of Spokane, in the state of Washington, as aforesaid, upon the date aforesaid, was fifty cents (50c.) for each one hundred pounds (100#) of the said property so transported, but the Grand Jurors aforesaid, on their oath aforesaid, do present and charge that at the said city of Minneapolis, Minnesota, in the said Fourth Division of the District of Minnesota, and within the jurisdiction of this Court, on the said seventeenth day of May, 1905, the said Great Northern Railway Company, the said B. Campbell, the said W. W. Broughton, and the said G. I. Sweney, officers and agents of the said Great Northern Railway Company, as aforesaid, did unlawfully grant and give to the said W. P. Devereux Company, corporation as aforesaid, a concession of Fifteen cents (15c.) of the said freight rate, as aforesaid, upon every one hundred pounds, (100#) of the property so transported by the said common carrier, as aforesaid, whereby the said property was by said corporation common carrier transported in said interstate commerce from the said city of Minneapolis to the said city of Spokane, by the route and in the manner aforesaid, at a less compensation and rate than that named therefor in the said tariffs and schedules so as aforesaid published and filed by the said common carrier and in force at the time upon its said route, and which were then and there on file with the Interstate Commerce Commission of the United States, as required by law; that they, the said B. Campbell, the said W. W. Broughton, and the said G. I. Sweney, agents and officers of the Great Northern Railway Company, as aforesaid, were then and there, in all things, acting as aforesaid for and in behalf of the Great Northern Railway Company within the scope of their respective employments; which is against the peace and dignity of the United States, and contrary to the form of the statute in such case made and provided.

Ninth Count.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present that before and during all the times mentioned in this ninth count of this indictment, the said Great Northern Railway Company was a corporation and a corporation common carrier operating its said railroad as in the first count of this indictment set forth and alleged, and one subject to the provisions of the Acts of Congress in that count mentioned; that during all of said time the W. P. Devereux Company was a corporation as set forth in the first count of this indictment, and the said B. Campbell, the said W. W. Broughton, and the said G. I. Sweney were officers and agents of the said Great Northern Railway Company as set forth in the first count

of this indictment; that at the said city of Minneapolis, in the state of Minnesota, on or about the seventeenth day of May, 1905, the said W. P. Devereux Company did deliver to the said Great Northern Railway Company, for transportation in interstate commerce by the said common carrier over its route aforesaid, to the said city of Seattle, in the state of Washington, certain property, to-wit: one (1) carload of corn of the net weight of sixty-one thousand four hundred ten pounds (61410#), and the said common carrier did forthwith, upon and in pursuance of such delivery of said property, transport the same by interstate commerce from the said city of Minneapolis, aforesaid, over its said route, through and beyond the Fourth Division of the said District of Minnesota, to the said City of Seattle, Washington, aforesaid, in car No. 74844, under way-bill No. 1799; that there had theretofore been published and filed by the said common carrier with the Interstate Commerce Commission of the United States, as required by law, certain tariffs, rates and schedules showing the legal rates and charges established by the said common carrier for the transportation of the property aforesaid between the points aforesaid and in force at the time upon its said route, copies of which tariffs and schedules are too voluminous to be herein set forth in full; that said tariffs were then and there on file with the Interstate Commerce Commission of the United States, as required by law; that said tariffs, rates and schedules, so made, published and filed with the Interstate Commerce Commission of the United States, as aforesaid, showed that the legal rates and charges established for the transportation of said property over the said railroad, from the said
16 city of Minneapolis, in the state of Minnesota, to the said city of Seattle, in the state of Washington, as aforesaid, upon the date aforesaid, was fifty cents (50c.) for each one hundred pounds (100#) of the said property so transported, but the Grand Jurors aforesaid, on their oath aforesaid, do present and charge that at the said city of Minneapolis, Minnesota, in the said Fourth Division of the District of Minnesota, and within the jurisdiction of this Court, on the said seventeenth day of May, 1905, the said Great Northern Railway Company, the said B. Campbell, the said W. W. Broughton, and the said G. I. Sweney, officers and agents of the said Great Northern Railway Company, as aforesaid, did unlawfully grant and give to the said W. P. Devereux Company, corporation as aforesaid, a concession of fifteen cents (15c.) of the said freight rate, as aforesaid, upon every one hundred pounds (100#) of the property so transported by the said common carrier as aforesaid, whereby the said property was by said corporation common carrier transported in said interstate commerce from the said city of Minneapolis to the said city of Seattle, by the route and in the manner aforesaid, at a less compensation and rate than that named therefor in the said tariffs and schedules so as aforesaid published and filed by the said common carrier and in force at the time upon its said route, and which were then and there on file with the Interstate Commerce Commission of the United States, as required by law; that they, the said B. Campbell, the said W. W. Broughton, and the said G. I. Sweney, agents and officers of the Great Northern Railway Com-

pany, as aforesaid, were then and there, in all things, acting as aforesaid for and in behalf of the Great Northern Railway Company within the scope of their respective employments; which is against the peace and dignity of the United States, and contrary to the form of the statute in such case made and provided.

Tenth Count.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present that before and during all the times mentioned in this tenth count of this indictment, the said Great Northern Railway Company was a corporation, and a corporation common carrier operating its said railroad as in the first count of this indictment set forth and alleged, and one subject to the provisions of the Acts of Congress in that count mentioned; that during all of said time the W. P. Devereux Company was a corporation as set forth in the first count of this indictment, and the said B. Campbell, the said W. W. Broughton, and the said G. I. Sweney were officers and agents of the said Great Northern Railway Company as set forth in said first count of this indictment; that at the said city of Minneapolis, in
17 the state of Minnesota, on or about the seventeenth day of May, 1905, the W. P. Devereux Company did deliver to the said Great Northern Railway Company, for transportation in interstate commerce by the said common carrier over its route aforesaid, to the said city of Spokane, in the state of Washington, certain property, to wit: one (1) carload of oats of the net weight of fifty-eight thousand eight hundred fifty pounds (50850#), and the said common carrier did forthwith, upon and in pursuance of such delivery of said property, transport the same by interstate commerce from the said city of Minneapolis aforesaid, over its said route, through and beyond the Fourth Division of the said District of Minnesota, to the said City of Spokane, Washington, aforesaid, in car No. 20776, under way-bill No. 1791; that there had theretofore been published and filed by the said common carrier with the Interstate Commerce Commission of the United States, as required by law, certain tariffs, rates and schedules showing the legal rates and charges established by the said common carrier for the transportation of the property aforesaid between the points aforesaid, and in force at the time upon its said route, copies of which tariffs and schedules are too voluminous to be herein set forth in full; that said tariffs were then and there on file within the Interstate Commerce Commission of the United States, as required by law; that said tariffs, rates and schedules, so made published and filed with the Interstate Commerce Commission of the United States, as aforesaid, showed that the legal rates and charges established for the transportation of said property over the said railroad, from the said city of Minneapolis, in the state of Minnesota, to the said city of Spokane, in the state of Washington, as aforesaid, upon the date aforesaid, was fifty cents (50c.) for each one hundred pounds (100#) of the said property so transported, but the Grand Jurors aforesaid, on their oath aforesaid, do present and charge that at the

said city of Minneapolis, Minnesota, in the said Fourth Division of the District of Minnesota, and within the jurisdiction of this Court, on the said seventeenth day of May, 1905, the said Great Northern Railway Company, the said B. Campbell, the said W. W. Broughton and the said G. I. Sweney, officers and agents of the said Great Northern Railway Company, as aforesaid, did unlawfully grant and give to the said W. P. Devereux Company, corporation as aforesaid, a concession of fifteen cents (15c.) of the said freight rate, as aforesaid, upon every one hundred pounds (100#) of the property so transported by the said common carrier, as aforesaid, whereby the said property was by said corporation common carrier transported in said interstate commerce from the said city of Minneapolis,
18 to the said city of Spokane, by the route and in the manner aforesaid, at a less compensation and rate than that named therefor in the said tariffs and schedules so as aforesaid published and filed by the said common carrier and in force at the time upon its said route and which were then and there on file with the Interstate Commerce Commission of the United States as required by law; that they, the said B. Campbell, the said W. W. Broughton, and the said G. I. Sweney agents and officers of the Great Northern Railway Company, as aforesaid, were then and there, in all things, acting as aforesaid for and in behalf of the Great Northen Railway Company within the scope of their respective employments: which is against the peace and dignity of the United States, and contrary to the form of the statute in such case made and provided.

Eleventh Count.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present that before and during all the times mentioned in this eleventh count of this indictment, the said Great Northern Railway Company was a corporation, and a corporation common carrier operating its said railroad as in the first count of this indictment set forth and alleged, and one subject to the provisions of the Acts of Congress in that count mentioned; that during all of said time the W. P. Devereux Company was a corporation as set forth in the first count of this indictment, and the said B. Campbell, the said W. W. Broughton, and the said G. I. Sweney were officers and agents of the said Great Northern Railway Company as set forth in said first count of this indictment; that at the said city of Minneapolis, in the state of Minnesota, on or about the seventeenth day of May, 1905, the said W. P. Devereux Company did deliver to the said Great Northern Railway Company, for transportation in interstate commerce by the said common carrier over its route aforesaid, to the said city of Seattle, in the state of Washington, certain property, to-wit: one (1) carload of oats of the net weight of seventy-seven thousand ten pounds (77010#), and the said common carrier did forthwith, upon and in pursuance of such delivery of said property, transport the same by interstate commerce from the said city of Minneapolis aforesaid, over its said route, through and beyond the Fourth Division of the said District of Minnesota, to the said city

of Seattle, Washington, aforesaid, in car No. 35782, under way-bill No. 1796; that there had theretofore been published and filed by the commo carrier with the Interstate Commerce Commission of the United States, as required by law, certain tariffs, rates and schedules showing the legal rates and charges established by the said
19 common carrier for the transportation of the property aforesaid between the points aforesaid, and in force at the time upon its said route, copies of which tariffs and schedules are too voluminous to be herein set forth in full; that said tariffs were then and there on file with the Interstate Commerce Commission of the United States, as required by law; that said tariffs, rates and schedules, so made, published and filed with the Interstate Commerce Commission of the United States, as aforesaid, showed that the legal rates and charges established for the transportation of said property over the said railroad, from the said city of Minneapolis, in the state of Minnesota, to the said city of Seattle, in the state of Washington, as aforesaid, upon the date aforesaid, was fifty cents (50c.) for each one hundred pounds (100#) of the said property so transported, but the Grand Jurors aforesaid, on their oath aforesaid, do present and charge that at the said city of Minneapolis, Minnesota, in the said Fourth Division of the District of Minnesota, and within the jurisdiction of this Court, on the said seventeenth day of May, 1905, the said Great Northern Railway Company, the said B. Campbell, the said W. W. Broughton and the said G. I. Sweney, officers and agents of the said Great Northern Railway Company, as aforesaid, did unlawfully grant and give to the said W. P. Devereux Company, corporation as aforesaid, a concession of fifteen cents (15c.) of the said freight rate, as aforesaid, upon every one hundred pounds (100#) of the property so transported by the said common carrier, as aforesaid, whereby the said property was by said corporation common carrier transported in said interstate commerce from the said city of Minneapolis to the said city of Seattle, by the route and in the manner aforesaid, at a less compensation and rate than that named therefor in the said tariffs and schedules so as aforesaid published and filed by the said common carrier and in force at the time upon its said route, and which were then and there on file with the Interstate Commerce Commission of the United States, as required by law; that they, the said B. Campbell, the said W. W. Broughton, and the said G. I. Sweney agents and officers of the Great Northern Railway Company, as aforesaid, were then and there, in all things, acting as aforesaid for and in behalf of the Great Northern Railway Company within the scope of their respective employments: which is against the peace and dignity of the United States, and contrary to the form of the statute in such case made and provided.

Twelfth Count.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present that before and during all the times men-
20 tioned in this twelfth count of this indictment, the said Great Northern Railway Company was a corporation, and a

corporation common carrier operating its said railroad as in the first count of this indictment set forth and alleged, and one subject to the provisions of the Acts of Congress in that count mentioned; that during all of said time the W. P. Devereux Company was a corporation as set forth in the first count of this indictment, and the said B. Campbell, the said W. W. Broughton, and the said G. I. Sweney were officers and agents of the said Great Northern Railway Company as set forth in said first count of this indictment; that at the said city of Minneapolis, in the state of Minnesota, on or about the seventeenth day of May, 1905, the said W. P. Devereux Company did deliver to the said Great Northern Railway Company, for transportation in interstate commerce by the said common carrier over its route aforesaid, to the said city of Seattle, in the State of Washington, certain property, to-wit; one (1) carload of oats of the net weight of seventy-four thousand three hundred pounds (74300#), and the said common carrier did forthwith, upon and in pursuance of such delivery of said property, transport the same by interstate commerce from the said city of Minneapolis, aforesaid, over its said route, through and beyond the Fourth Division of the District of Minnesota, to the said city of Seattle, Washington, aforesaid, in car No. 31572, under way-bill No. 1795; that there had theretofore been published and filed by the said common carrier with the Interstate Commerce Commission of the United States, as required by law, certain tariffs, rates and schedules showing the legal rates and charges established by the said common carrier for the transportation of the property aforesaid between the points aforesaid, and in force at the time upon its said route, copies of which tariffs and schedules are too voluminous to be herein set forth in full; that said tariffs were then and there on file with the Interstate Commerce Commission of the United States, as required by law; that said tariffs, rates and schedules, so made, published and filed with the Interstate Commerce Commission of the United States, as aforesaid, showed that the legal rates and charges established for the transportation of said property over the said railroad, from the said city of Minneapolis, in the state of Minnesota, to the said city of Seattle, in the state of Washington, as aforesaid, upon the date aforesaid, was fifty cents (50c.) for each one hundred pounds (100#) of the said property so transported, but the Grand Jurors aforesaid, on their oath aforesaid, do present and charge that at the said city of Minneapolis, Minnesota, in the said Fourth Division of the District of Minnesota, and within the Jurisdiction of this Court, on the said seventeenth day of May, 1905, the said
21 Great Northern Railway Company, the said B. Campbell, the said W. W. Broughton and the said G. I. Sweney, officers and agents of the said Great Northern Railway Company, as aforesaid, did unlawfully grant and give to the said W. P. Devereux Company, corporation as aforesaid, a concession of fifteen cents (15c.) of the said freight rate, as aforesaid, upon every one hundred pounds (100#) of the property so transported by the said common carrier, as aforesaid, whereby the said property was by said

corporation common carrier transported in said interstate commerce from the said city of Minneapolis to the said city of Seattle, by the route and in the manner aforesaid, at a less compensation and rate than that named therefor in the said tariffs and schedules so as aforesaid published and filed by the said common carrier and in force at the time upon its said route, and which were then and there on file with the Interstate Commerce Commission of the United States, as required by law; that they, the said B. Campbell, the said W. W. Broughton, and the said G. I. Sweney, agents and officers of the Great Northern Railway Company, as aforesaid, were then and there, in all things, acting as aforesaid for and in behalf of the Great Northern Railway Company within the scope of their respective employments; which is against the peace and dignity of the United States, and contrary to the form of the statute in such case made and provided.

Thirteenth Count.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present that before and during all the times mentioned in this thirteenth count of this indictment, the said Great Northern Railway Company was a corporation, and a corporation common carrier operating its said railroad as in the first count of this indictment set forth and alleged, and one subject to the provisions of the Acts of Congress in that count mentioned; that during all of said time the W. P. Devereux Company was a corporation as set forth in the first count of this indictment, and the said B. Campbell, the said W. W. Broughton, and the said G. I. Sweney were officers and agents of the said Great Northern Railway Company as set forth in said first count of this indictment; that at the said city of Minneapolis, in the state of Minnesota, on or about the first day of June, 1905, the said W. P. Devereux Company did deliver to the said Great Northern Railway Company, for transportation in interstate commerce by the said common carrier over its route aforesaid, to the said city of Seattle, in the state of Washington, certain property, to-wit; one
(1) carload of oats of the net weight of sixty-seven thousand
22 three hundred fifty pounds (67350#), and the said common carrier did forthwith, upon and in pursuance of such delivery of said property, transport the same by interstate commerce from the said city of Minnesota aforesaid, over its said route, through and beyond the Fourth Division of the said District of Minnesota, to the said city of Seattle, Washington, aforesaid, in car No. 11682, under way-bill No. 67; that there had theretofore been published and filed by the said common carrier with the Interstate Commerce Commission of the United States, as required by law, certain tariffs, rates and schedules showing the legal rates and charges established by the said common carrier for the transportation of the property aforesaid between the points aforesaid, and in force at the time upon its said route, copies of which tariffs and schedules are too voluminous to be herein set forth in full; that said tariffs were then and there on file with the Interstate Commerce Commission of the United States, as

required by law; that said tariffs, rates and schedules, so made, published and filed with the Interstate Commerce Commission of the United States, as aforesaid, showed that the legal rates and charges established for the transportation of said property over the said railroad, from the said city of Minneapolis, in the state of Minnesota, to the said city of Seattle, in the state of Washington, as aforesaid, upon the date aforesaid, was fifty cents (50c.) for each one hundred pounds (100#) of the said property so transported, but the Grand Jurors aforesaid, on their oath aforesaid, do present and charge that at the said city of Minneapolis, Minnesota, in the said Fourth Division of the District of Minnesota, and within the jurisdiction of this Court, on the said first day of June, 1905, the said Great Northern Railway Company, the said B. Campbell, the said W. W. Broughton, and the said G. I. Sweney, officers and agents of the said Great Northern Railway Company, as aforesaid, did unlawfully grant and give to the said W. P. Devereux Company, corporation as aforesaid, a concession of twenty cents (20c.) of the said freight rate, as aforesaid, upon every one hundred pounds (100#) of the property so transported by the said common carrier, as aforesaid, whereby the said property was by said corporation common carrier transported in said interstate commerce from the said city of Minneapolis to the said city of Seattle, by the route and in the manner aforesaid, at a less compensation and rate than that named therefore in the said tariffs and schedules so as aforesaid published and filed by the said common carrier and in force at the time upon its said route, and which were then and there on file with the Interstate Commerce Commission of the United States, as required by law; that they, the said B. Campbell, the said W. W. Broughton, and the said G. I. Sweney, agents and officers of the Great Northern Railway
23 Company, as aforesaid, were then and there, in all things, acting as aforesaid for and in behalf of the Great Northern Railway Company within the scope of their respective employments; which is against the peace and dignity of the United States, and contrary to the form of the statute in such case made and provided.

Fourteenth Count.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present that before and during all the times mentioned in this fourteenth count of this indictment, the said Great Northern Railway Company was a corporation, and a corporation common carrier operating its said railroad as in the first count of this indictment set forth and alleged, and one subject to the provisions of the Acts of Congress in that count mentioned; that during all of said time the W. P. Devereux Company was a corporation as set forth in the first count of this indictment, and the said B. Campbell, the said W. W. Broughton, and the said G. I. Sweney, were officers and agents of the said Great Northern Railway Company as set forth in said first count of this indictment; that at the said city of Minneapolis, in the state of Minnesota, on or about the thirteenth day of June, 1905, the said W. P. Devereux Company did deliver to the

said Great Northern Railway Company, for transportation in interstate commerce by the said common carrier over its route aforesaid, to the said city of Bellingham, in the state of Washington, certain property, to-wit: one (1) carload of corn of the net weight of seventy-three thousand eight hundred ninety pounds (73890#), and the said common carrier did forthwith, upon and in pursuance of such delivery of said property, transport the same by interstate commerce from the said city of Minneapolis, aforesaid, over its said route, through and beyond the Fourth Division of the District of Minnesota, to the said city of Bellingham, Washington, aforesaid, in car No. 30626, under way-bill No. 326; that there had theretofore been published and filed by the said common carrier with the Interstate Commerce Commission of the United States, as required by law, certain tariffs, rates and schedules showing the legal rates and charges established by the said common carrier for the transportation of the property aforesaid between the points aforesaid, and in force at the time upon its said route, copies of which tariffs and schedules are too voluminous to be herein set forth in full; that said tariffs were then and there on file with the Interstate Commerce Commission of the United States, as reqired by law; that said tariffs, rates and schedules, so made, published and filed with the Interstate Commerce Commission of the United States, as aforesaid, showed that
24 the legal rates and charges established for the transportation of said property over the said railroad, from the said city of Minneapolis, in the state of Minnesota, to the said city of Bellingham, in the state of Washington, as aforesaid, upon the date aforesaid, was fifty cents (50c.) for each one hundred pounds (100#) of the said property so transported, but the Grand Jurors aforesaid, on their oath aforesaid, do present and charge that at the said city of Minneapolis, Minnesota, in the said Fourth Division of the District of Minnesota, and within the jurisdiction of this Court, on the said thirteenth day of June, 1905, the said Great Northern Railway Company, the said B. Campbell, the said W. W. Broughton, and the said G. I. Sweney, officers and agents of the said Great Northern Railway Company, as aforesaid, did unlawfully grant and give to the said W. P. Devereux Company, corporation as aforesaid, a concession of eighteen cents (18c.) of the said freight rate, as aforesaid, upon every one hundred pounds (100#) of the property so transported by the said common carrier, as aforesaid, whereby the said property was by said corporation common carrier transported in said interstate commerce from the said city of Minneapolis to the said city of Bellingham, by the route and in the manner aforesaid, at a less compensation and rate than that named therefor in the said tariffs and schedules so as aforesaid published and filed by the said common carrier and in force at the time upon its said route, and which were then and there on file with the Interstate Commerce Commission of the United States, as required by law; that they, the said B. Campbell, the said W. W. Broughton, and the said G. I. Sweney, agents and officers of the Great Northern Railway Company, as aforesaid, were then and there, in all things, acting as aforesaid for and in behalf of the Great Northern Railway Company within the scope

of their respective employments: which is against the peace and dignity of the United States, and contrary to the form of the statute in such case made and provided.

Fifteenth Count.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present that before and during all the times mentioned in this fifteenth count of this indictment, the said Great Northern Railway Company was a corporation, and a corporation common carrier operating its said railroad as in the first count of this indictment set forth and alleged, and one subject to the provisions of the Acts of Congress in that count mentioned; that during all of said time the W. P. Devereux Company was a corporation as set forth in the first count of this indictment, and the said B. Campbell, the said W. W. Broughton and the said G. I. Sweney were officers and agents
25 of the said Great Northern Railway Company as set forth in said first count of this indictment; that at the said city of Minneapolis, in the state of Minnesota, on or about the fifth day of June, 1905, the said W. P. Devereux Company did deliver to the said Great Northern Railway Company, for transportation in interstate commerce by the said common carrier over its route aforesaid, to the said city of Seattle, in the state of Washington, certain property, to-wit: one (1) carload of corn of the net weight of eighty-four thousand nine hundred forty pounds (84940#), and the said common carrier did forthwith, upon and in pursuance of such delivery of said property, transport the same by interstate commerce from the said city of Minneapolis, aforesaid, over its said route, through and beyond the Fourth Division of the District of Minnesota, to the said city of Seattle, Washington, aforesaid, in car No. 32232, under way-bill No. 324; that there had theretofore been published and filed by the said common carrier with the Interstate Commerce Commission of the United States, as required by law, certain tariffs, rates and schedules showing the legal rates and charges established by the said common carrier for the transportation of the property aforesaid between the points aforesaid, and in force at the time upon its said route, copies of which tariffs and schedules are too voluminous to be herein set forth in full; that said tariffs were then and there on file with the Interstate Commerce Commission of the United States, as required by law; that said tariffs, rates and schedules, so made, published and filed with the Interstate Commerce Commission of the United States, as aforesaid, showed that the legal rates and charges established for the transportation of said property over the said railroad, from the said city of Minneapolis, in the state of Minnesota, to the said city of Seattle, in the state of Washington, as aforesaid, upon the date aforesaid, was fifty cents (50c.) for each one hundred pounds (100#) of the said property so transported, but the Grand Jurors aforesaid, on their oath aforesaid, do present and charge that at the said city of Minneapolis, Minnesota, in the said Fourth Division of the District of Minnesota, and within the jurisdiction of this court, on the said fifth day of June, 1905, the said Great Northern Railway Company, the said B. Camp-

bell, the said W. W. Broughton, the said G. I. Sweney, officers and agents of the said Great Northern Railway Company, as aforesaid, did unlawfully grant and give to the said W. P. Devereux Company, corporation as aforesaid, a concession of eighteen cents (18c.) of the said freight rate, as aforesaid, upon every one hundred pounds (100#) of the propery so transported by the said common carrier, as aforesaid, whereby the said property was by said corporation common carrier transported in said interstate commerce from
26 the said city of Minneapolis to the said city of Seattle, by the route and in the manner aforesaid, at a less compensation and rate than that named therefor in the said tariffs and schedules so as aforesaid published and filed by the said common carrier and in force at the time upon its said route, and which were then and there on file with the Interstate Commerce Commission of the United States, as required by law; that they, the said B. Campbell, the said W. W. Broughton, and the said G. I. Sweney, agents and officers of the Great Northern Railway Company, as aforesaid, were then and there, in all things, acting as aforesaid for and in behalf of the Great Northern Railway Company within the scope of their respective employments; which is against the peace and dignity of the United States, and contrary to the form of the statute in such case made and provided.

PAUL A. EWERT,
Assistant United States Attorney.

Endorsed: Indictment. A true bill. Robert D. Cone, Foreman of the Grand Jury. Names of witnesses examined before the Grand Jury: John S. Sandberg, Fred'k H. Parker, Burt W. Rand, Silas H. Smith, Arthur E. Chapman, William H. Gaskill, Raleigh F. Clough, David G. Black, William R. Hafie, Edward Sawyer. Charles C. Houpt, United States District Attorney. Filed November 8, 1906. Charles L. Spencer, Clerk.

And thereafter, and on the 24th day of November, A. D. 1906, certain proceedings were had in said Court in said action which said proceedings were duly recorded in the words and figures following, to-wit:

United States District Court, District of Minnesota, Fourth Division.

Term Minutes, October Term, A. D. 1906, November 24th, 1906.

SATURDAY MORNING.

Court opened pursuant to adjournment.
Present: Honorable William Lochren, Judge.

THE UNITED STATES
vs.
GREAT NORTHERN RAILWAY COMPANY, BENJAMIN CAMPBELL, WILLIAM W. BROUGHTON, and GUY I. SWENEY.

Indictment No. 3619 under Acts of February 4, 1887, and February 19, 1903.

And now the defendants in the above entitled action appear at the bar of this Court, the said Railway Company and Benjamin Campbell by Rome G. Brown, William R. Begg and Charles S. Albert, Esquires, their attorneys, and the said William W.
27 Broughton and Guy I. Sweney personally, and by said Rome G. Brown, William R. Begg and Charles S. Albert, Esquires, their attorneys, and each of said personal defendants doth declare his true name to be respectively as above stated, and they are arraigned upon an indictment presented and filed against them at the present term of this Court charging, in fifteen counts of said indictment, that in the months of May, June, July and August, A. D. 1905, at the city of Minneapolis, in the County of Hennepin, in the State and District of Minnesota, they did then and there unlawfully, grant and give to the W. P. Devereux Company, a corporation, certain concessions from certain published freight rates and tariffs of said carrier for the transportation of certain property by interstate commerce whereby said property was so transported at a less rate than that named in said published rates and tariffs for such transportation;

And the reading of said indictment having been expressly waived by the said attorneys for said defendants, one week is given as time within which each of said defendants may plead, demur, or otherwise object to said indictment.

And thereafter, and on the same day, a certain demurrer to the said Indictment was filed in said Court in said action, which said demurrer is in the words and figures following, to-wit:

United States District Court, District of Minnesota, Fourth Division.

No. 3619.

THE UNITED STATES
vs.
GREAT NORTHERN RAILWAY COMPANY, and B. CAMPBELL, W. W. BROUGHTON, and G. I. SWENEY.

Demurrer to Indictment.

The above named defendants, and each of them, now come into court, the Great Northern Railway Company appearing by its attorneys, William R. Begg and Rome G. Brown and Charles S. Albert, and the said defendants W. W. Broughton, and B. Campbell, and G. I. Sweney, each in his own proper person, and having heard the said indictment read, says that the said indictment, and each count in the said indictment and the matters therein contained in the manner and form as the same are therein stated and set forth are not sufficient in law, and that neither they, the said defendants, nor either of them, are bound by the law of the land to answer the same, and that this the said defendants and each of them are ready to verify; wherefore for want of sufficient indictment in this behalf the said defendants, and each of them, pray judgment and that
28 by the court they and each of them be dismissed and discharged from the said premises in the said indictment specified.

And the said demurrer is based upon the following grounds, to-wit:

1. That neither the said indictment, nor any count in the said indictment, states sufficient facts or grounds to constitute against the said defendants, or either of them, an offense against the laws of the United States, nor any offense;

2. That the statute of the United States creating the offense or offenses pretended to be charged in the said indictment, and under which the said indictment was found, was duly repealed and was not in force at the time when the said indictment was found.

Dated November 24th, 1906.

WM. R. BEGG AND
ROME G. BROWN,
CHAS. S. ALBERT,
Attorneys for Defendants,
1006 *Guaranty Building, Minneapolis, Minn.*

Endorsed: Demurrer to Indictment. Filed Nov. 24, 1906. Charles L. Spencer, Clerk. By Geo. F. Hitchcock, Jr., Deputy.

And thereafter, and on the 13th day of December, A. D. 1906, certain proceedings were had in said Court in said action, which said proceedings were duly recorded in the words and figures following, to-wit:

United States District Court, District of Minnesota, Fourth Division.

Term Minutes, October Term, A. D. 1906, December 13, 1906.

THURSDAY MORNING.

Court opened pursuant to adjournment.
Present: Honorable William Lochren, Judge. Honorable Page Morris, Judge.

THE UNITED STATES
vs.
GREAT NORTHERN RAILWAY COMPANY, BENJAMIN CAMPBELL, WILLIAM W. BROUGHTON, and GUY I. SWENEY.

Indictment No. 3619 under Acts of February 4, 1887, and February 19, 1903.

The above entitled action came on this day to be heard upon the demurrer to the indictment in said action heretofore filed, Charles C. Houpt, Esq., United States Attorney appearing in
29 opposition to said demurrer on the part of the plaintiff, and William R. Begg, Esq., in support of said demurrer on the part of the defendants. Said demurrer is argued in part by said attorneys and the further argument thereon is postponed and continued until the following day.

And thereafter, and on the 14th day of December, A. D. 1906, certain proceedings were had in said Court in said action, which said proceedings were duly recorded in the words and figures following, to-wit:

United States District Court, District of Minnesota, Fourth Division.

Term Minutes, October Term, A. D. 1906, December 14, 1906.

FRIDAY MORNING.

Court opened pursuant to adjournment.
Present: Honorable William Lochren, Judge. Honorable Page Morris, Judge.

THE UNITED STATES
vs.
GREAT NORTHERN RAILWAY COMPANY, BENJAMIN CAMPBELL, WILLIAM W. BROUGHTON, and GUY I. SWENEY.

Indictment No. 3619 under Acts of February 4, 1887, and February 19, 1903.

The above entitled action came on this day to be further heard upon the demurrer to the indictment in said action heretofore filed, Charles C. Houpt, Esq., United States Attorney appearing in op-

position to said demurrer on the part of the plaintiff, and W. R. Begg, Esq., in support of said demurrer on the part of the defendants. Said demurrer is further argued and submitted and by the Court taken under advisement.

And thereafter and on the 26th day of January, A. D. 1907, a certain paper writing was filed in said Court in said action, which said paper writing is in the words and figures following, to-wit:

United States District Court, District of Minnesota, Fourth Division.

No. 3616.

THE UNITED STATES
vs.
CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, HIRAM M. PEARCE, EDGAR B. OBER, and FREDERICK C. GIFFORD.

30 No. 3617.

THE UNITED STATES
vs.
GREAT NORTHERN RAILWAY COMPANY, BENJAMIN CAMPBELL, WILLIAM W. BROUGHTON, HIRAM A. KIMBALL, and DAVID G. BLACK.

No. 3618.

THE UNITED STATES
vs.
GREAT NORTHERN RAILWAY COMPANY, BENJAMIN CAMPBELL, WILLIAM W. BROUGHTON, HIRAM A. KIMBALL, and AUBREY G. MAGUIRE.

No. 3619.

THE UNITED STATES
vs.
GREAT NORTHERN RAILWAY COMPANY, BENJAMIN CAMPBELL, WILLIAM W. BROUGHTON, and GUY I. SWENEY.

No. 3620.

THE UNITED STATES
vs.
GREAT NORTHERN RAILWAY COMPANY, BENJAMIN CAMPBELL, WILLIAM W. BROUGHTON, and GUY I. SWENEY.

No. 3621.

THE UNITED STATES
vs.
WISCONSIN CENTRAL RAILWAY COMPANY, BURTON JOHNSON, and GEORGE T. HUEY.

No. 3622.

THE UNITED STATES
vs.
MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY and JAMES T. KENNEY.

No. 3622.

THE UNITED STATES
vs.
AMES-BROOKS COMPANY.

No. 3624.

THE UNITED STATES
vs.
DULUTH SUPERIOR MILLING COMPANY.

No. 3625.

THE UNITED STATES
vs.
THE MCCAULL-DINSMORE COMPANY.

The above entitled actions came on to be heard, at Minneapolis, in said district, on the 13th day of December, 1906, on the demurrers heretofore filed by the defendants to the indictments therein.

Thomas Wilson, Esquire, appeared on behalf of the Chicago, St. Paul, Minneapolis & Omaha Railway Company and other defendants;

31 C. A. Severance, Esquire, appeared on behalf of Ames-Brooks Company, and other defendants;

Wm. R. Begg, Esquire, appeared on behalf of the Great Northern Railway Company and other defendants;

George R. Seavers, Esq., appeared on behalf of Minneapolis & Saint Louis Railway Company and other defendants;

Walter D. Corrigan, Esquire, appeared on behalf of Wisconsin Central Railway Company and other defendants;

Charles C. Houpt, Esquire, and Paul A. Ewert, Esquire, appeared on behalf of the United States.

After hearing the arguments of the respective counsel, and having duly considered the same, and for the reasons expressed in the opinion herewith filed,

It is now ordered, that the said demurrers be, and the same are hereby, overruled.

PAGE MORRIS,
District Judge.

Dated, January 26, A. D. 1907.

Memorandum.

It is proper to state that my associate, Judge Lochren, who sat with me at the hearing of these demurrers, but who takes no part in this decision, does not concur in the views expressed in the opinion herewith filed. His view is as follows:

"That section 13 of the Revised Statutes gives a rule of construction only applicable to such repealing statutes as have no express saving clause, indicating that such matter was in the mind of Congress when it passed the repealing act, and therefore was not one of the matters then expressly acted upon. Section 10 of the Hepburn Act expressly repeals the parts of the Elkins Act on which these indictments rest, and also contains an express saving clause covering only pending cases. Thus Congress in the Hepburn Act expressly provided just what penalties, forfeitures and liabilities should not be extinguished by the repeal, and equally by the force of the express language used extinguished others. It does this by the express language of the repeal, without resorting to the maxim *Expressio unius est exclusio alterius;* and it therefore does expressly provide that the effect of the repeal shall be different from what it would have been, were there no express saving clause, and the matter left to the construction required by section 13. It therefore matters not whether the saving clause thus expressed covers only civil causes, or causes which are both criminal and civil."

32 (Endorsed:) Order overruling Demurrers. Filed January 26, 1907, 9:30 o'clock A. M. Charles L. Spencer, Clerk. By Margaret C. Noonan, Deputy.

And thereafter, and on the same day, a certain other paper writing was filed in said Court in said action, which said writing is in the words and figures following, to-wit;

In the United States District Court, District of Minnesota, Fourth Division.

UNITED STATES OF AMERICA, Plaintiff,
vs.
CHICAGO, SAINT PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, E. B. OBER, H. M. PEARCE, F. C. GIFFORD, Defendants.

UNITED STATES OF AMERICA, Plaintiff,
vs.
AMES-BROOKS COMPANY, Defendant, and Other Cases.

The first ground on which the demurrers in these cases are rested is, that the indictments do not charge a violation of the statutes in force at the date of the doing of the illegal acts.

The particular allegations to which attention is directed are as follows:

"That on the 26th day of December, 1905, the said Spencer Grain Company did deliver ..... one carload of oats ..... consigned to Cargill Commission Company, Duluth, Minnesota, to the said common carrier aforesaid (the defendant Railway Company) at said city of Minneapolis, for transportation by said common carrier ..... by interstate commerce to said city of Duluth, and the said common carrier did immediately upon and in pursuance of such delivery of said property so transport the same by interstate commerce over its said route or the line of railway hereinbefore mentioned, running from the said city of Minneapolis to the said city of Duluth ..... and the said Spencer Grain Company did thereupon pay to the said common carrier, and the said common carrier did receive from said Spencer Grain Company the freight rates and charges for the transportation of said property set forth in the tariffs and schedules then showing the legal rates and charges established by said common carrier for such services then in force and effect upon its said route, to-wit: five cents per each one hundred pounds ..... and that the said Chicago, St. Paul, Minneapolis & Omaha Railway Company, the said H. M. Pearce, E. B. Ober, and F. C. Gifford, officers and agents of the said Chicago, St. Paul, Minneapolis & Omaha Railway Company as aforesaid, did on the
33 15th day of February, A. D. 1906, ... willfully and unlawfully grant and pay to the said Spencer Grain Company a corporation, as aforesaid, certain rebates of the said freight rates and charges so paid as aforesaid, and certain concessions in respect to the said transportation of said property, whereby the said property was by said corporation common carrier transported in said interstate commerce from the said city of Minneapolis to the said city of Duluth ..... at a less compensation and rate than that named therefor in the said tariffs and schedules, that is to say, a rebate, refund and concession of one-half cent per bushel on each bushel of said oats."

The contention, if I understand it, is this, that if the full amount of the legal schedule rate was in form paid and received as a cover or fraudulent device pursuant to a prearrangement or understanding that less than the legal tariff rate should be in fact paid and accepted for the services rendered, it should have been so charged in the indictment.

The argument proceeds upon the assumption that the indictment was based upon sections 2, 3, and 6, (particularly section 6) of "An Act to Regulate Commerce," approved February 4, 1887 and the acts amendatory thereof prior to the passage of the Act of June 29, 1906, commonly known as "The Hepburn Act." It is sufficient to say, in answer to this, that the indictment is not based upon said sections, but is based upon the first section of the "Act to Further Regulate Commerce with Foreign Nations and Among the States," approved February 19, 1903, commonly known as "The Elkins Act," (which I shall hereafter fully set forth so far as may be necessary in the consideration of this case) and that under said section of the latter act no such allegation is necessary.

The argument further proceeds, as I understand it, upon the

theory that if it were conceded that the defendant, without any prearrangement or understanding, express or implied, at some time after the service was performed and paid for, refunded to a shipper a sum equal to a given per cent. of the tariff before paid, that would not necessarily be a violation of any federal statute; because if the defendant railway company, on account of certain conditions or circumstances, found it necessary, in order to compete with a rival company and to build up a through business over its line and the Great Lakes to the East, to pay the cost of transferring such grain, after it had been transported over its line, through an elevator to the vessels, or what would be on principle the same, having an elevator of its own, to pass the grain through it without charge, by first receiving the rates and charges set forth in the published tariffs and schedules and afterwards refunding to the shipper the
34 cost of such transfer; or if, in order to compete with a rival company, it offered and gave to the shipper of such grain storage free in its elevator while awaiting shipment, or for such grain it furnished sidetracks and the use of its cars, without charging demurrage, while awaiting shipment, by first receiving the published rates and charges and afterwards refunding to the shipper the cost of such storage of demurrage, hoping thus to build up such a traffic over its line, that would not be illegal.

It is sufficient to say, in answer to this contention, that even if such conditions or circumstances, if they actually existed, might be shown in defense, (which I extremely doubt, but which I do not think it necessary now to decide), it was not necessary under the Elkins Act, in addition to the allegation that the defendant did on the 15th day of February, 1906, willfully and unlawfully grant and pay certain rebates and concessions in respect to the transportation of the grain whereby the said grain was transported in interstate commerce from the city of Minneapolis to the city of Duluth at a less compensation and rate than that named therefor in the published tariffs and schedules, to make any allegation negativing the existence of such conditions or circumstances.

It seems to me, therefore, that this ground of demurrer is not well taken.

The second ground on which the demurrers are based is, that since the passage of the act entitled "An Act to Amend an Act Entitled 'An Act to Regulate Commerce,' approved February 4, 1887, and All Acts Amendatory Thereof, and to Enlarge the Powers of the Interstate Commerce Commission," approved June 29, 1906, (Stats. of the U. S. First Sess. 59th Congress, 1905-1906, Part 1, p. 584), commonly known as "The Hepburn Law," (and which I shall hereafter for the sake of brevity refer to as the Hepburn Law) there can be no prosecutions under the first section of the law commonly known as "The Elkins Law," (U. S. Stat. at Large, Vol. 32, Part 1, p. 847) (and which I shall hereafter for the sake of brevity refer to as the Elkins Law) for violations of said law except in cases where the prosecutions were pending at the time of the passage of the Hepburn Law. In other words, that only those offenders against the first section of the Elkins Law against whom causes were pend-

ing at the time of the passage of the Hepburn Law can now be prosecuted.

Section 1 of the Elkins Law, in so far as it is necessary to consider it here, provides as follows:

....it shall be unlawful for any person, persons, or corporation to offer, grant, or give or to solicit, accept, or receive any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the acts amendatory thereto whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced. Every person or corporation who shall offer, grant, or give or solicit, accept or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars. In all convictions occurring after the passage of this Act for offenses under said acts to regulate commerce, whether committed before or after the passage of this act, or for offenses under this section, no penalty shall be imposed on the convicted party other than the fine prescribed by law, imprisonment wherever now prescribed as part of the penalty being hereby abolished. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offence had been actually and wholly committed therein.

In construing and enforcing the provisions of this section the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier acting within the scope of his employment shall in every case be also deemed to be the act, omission, or failure of such carrier as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereto, or participates in any rates so filed or published, that rate as against such carrier, its officers, or agents in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act."

Section 2 of the Hepburn Law amends the foregoing section of the Elkins Law as follows:

.....It shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate

commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars; provided that any person, or any officer or director of any corporation subject to the provisions of this Act, or the Act to regulate commerce and the Acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and published in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

"In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereof, or participates in any rates so filed or publsihed, that rate as against such carrier, its officers or agents, in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act."

It will thus be noticed that by the Hepburn Law section 1 of the Elkins Law was amended by inserting after the words:
37 "Every person or corporation," in the clause declaring the parties guilty of a misdemeanor, the words "whether carrier or shipper," and also by inserting in said clause after the words "who shall" the word "knowingly"; by striking out the clause providing that no penalty shall be imposed other than a fine and inserting in lieu thereof the proviso, in substance, that any person or any officer or director of any corporation subject to the provisions of the act, or any receiver, trustee, lessee, agent or person acting for or employed by any such corporation, shall in addition

to the fine, be liable to imprisonment in the penitentiary for a term not exceeding two years, or both such fine and imprisonment, in the discretion of the court; and by inserting after the word "carrier" in the two instances in which said word appears in the second paragraph the words "or shipper."

Section 10 of the Hepburn Law, (which I shall hereafter for the sake of brevity refer to as Section 10,) reads as follows:

"SEC. 10. That all laws and parts of laws in conflict with the provisions of this act are hereby repealed, but the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law."

Section 4 of an act entitled "An Act Prescribing the Form of the Enacting and Resolving Clauses of Acts and Resolutions of Congress and Rules for the Construction Thereof," approved February 25th, 1871, (Chap. 71, 16 Stat., 432; R. S. U. S., 2nd Ed. 1878, p. 2, ch. 2, sec. 13; U. S. Comp*l*ied Stats. 1901, Vol. 1, p. 6, sec. 13;) (which I shall hereafter refer to as Section 13,) reads as follows:

"SEC. 13. The *ap*peal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

The defendants here were indicted after the passage and going into effect of the Hepburn Law for violations of the first section of the Elkins Law alleged to have been committed before the passage of the Hepburn Law.

The contention, as I understand it, is this: that by Section 10 of the Hepburn Law Section 1 of the Elkins Law was repealed, and that by inserting after the words of repeal in Section 10 the
38 clause, "but the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law," Congress by necessary implication evinced its clear intention to save only such criminal prosecutions under Section 1 of the Elkins Law as were then pending in the courts of the United States, and to release from prosecution all those who had violated that section, but against whom prosecutions were not then pending.

I do not think it necessary to consider the question so fully and elaborately discussed by counsel for the defendants in their briefs and at the oral argument, citing many cases, as to whether or not the first section of the Elkins Law has been repealed and superseded by the Hepburn Law. It was conceded on the argument by the counsel for the government that not only was the said section of the Elkins Law expressly repealed by Section 10 of the Hepburn Law, by the words "that all laws and parts of laws in conflict with the provisions of this act are hereby repealed," but that, even in the absence of those words, it must be held to have been repealed under

the rule laid down in the case of U. S. *v.* Tynen, (11 Wall., 88) wherein the court declares:

"When there are two acts on the same subject, the rule is to give effect to both, if possible; but if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates, to the extent of the repugnancy, as a repeal of the first; and even where two acts are not in express terms repugnant, yet, if the latter act covers the whole subject-matter of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act."

The only question here to be considered is whether or not the clause after the repealing words in Section 10 above set forth has the effect by necessary implication, when used in connection with said repealing words, notwithstanding the provision of Section 13 above set forth, to release from criminal prosecution under the first section of the Elkins Law those who had violated that law prior to the passage of the Hepburn Law, but who had not been indicted prior to the passage of the Hepburn Law.

Among the numerous cases cited by counsel I find only one which bears upon the exact question now under consideration, and that is the case of Lang, *et al.*, *v.* U. S. (133 Fed. Reporter, 201.) In case of U. S. *v.* Hague, (22 Fed. Reporter, 706,) it does not appear that Section 13 was called to the attention of the court or was considered by the court. If it was, the decision is exactly contrary to that in U. S. *v.* Reisinger, (128 U. S., 398). In the latter
39 case Section 13 was considered by the Supreme Court of the United States, and they there held that the words "penalty," "liability," and "forfeiture" used in Section 13 apply to crimes, and the punishments therefor, and that section abrogated the rule of the common law that the repeal of a statute operates as a remission of all penalties for violation of it, committed before its repeal, and a release from prosecution therefore after said repeal, unless there be either a clause in the repealing statute, or a provision of some other statute, expressly authorizing such prosecution, and that that section contained such a provision. This case is not, I think, in point, except as above indicated, because of the difference in the language of the repealing sections there and here.

In the case of State *v.* Showers, (34 Kans., 269,) cited with approval by Judge Jenkins in the Lang case and declared by him to be on all fours with that case, the Kansas statute then being considered was as follows:

"SEC. 1. In the construction of the statutes of this state the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature, or repugnant to the context of the statute: First, The repeal of a statute does not revive a statute previously repealed, nor does such repeal affect any right which accrued, any duty imposed, any penalty incurred, nor any proceeding commenced under or by virtue of the statute repealed. The provisions of any statute, so far as they are the same as those of any prior statute, shall be construed as a continuation of such provisions, and not as a new enactment."

The repealing clause there being considered was as follows:

"SEC. 15. Original sections 2, 3, 4, 7, 8, 9, 12, 13 and 21 of the said act, to which this act is amendatory and supplemental, are hereby repealed. All prosecutions pending at the time of the taking effect of this act shall be continued the same as if this act had not been passed."

It will be noted that the words of the Kansas statutes above quoted are far from identical with those of the federal statutes now being considered. The Kansas statute of construction contains the words "unless such construction would be inconsistent with the manifest intent of the legislature, or repugnant to the context of the statute," and thus leaves open to the courts the application of the recognized canons of construction to ascertain from the language of the repealing statute and the context of the statute the intent of he legislature. There are no such words in section 13, and the Kansas statute does not provide, as does Section 13, that the repeal of any
40 statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under the repealed statute, unless the repealing act shall so expressly provide. Under the Kansas statute it was not necessary to expressly provide in the repealing act that a certain class of offenders shall be released from prosecution; but under the federal statute it is imperative that there should be such an express provision, The words "unless the repealing act shall so expressly provide" differentiates the two statutes, and in my opinion, make the Kansas case of little, if any value in determining the question now under consideration.

The case of Lang, *et al., v.* U. S., *supra*, is, I think, on all fours with the one at bar, and is the only one in all the cases cited that bears on the exact question now being discussed. In that case Section 3 of the Act of March 3, 1875, (18 Stat. c. 141, p. 477; U. S. Comp. Stats. 1901, p. 1286;) under which plaintiffs in error were indicted, was amended, repealed and superseded by Section 3 of the Act of March 3, 1903. (32 Stats. c. 1012, p. 1214.) Section 28 of the latter act reads as follows:

"SEC. 28. That nothing contained in this act shall be construed to affect any prosecution or other proceeding, criminal or civil, begun under any existing act or any acts hereby amended, but such prosecutions and other proceedings, criminal or civil, shall proceed as if this act had not been passed. (32 Stats. c. 1012, p. 1220.)

And the 36th section of the latter act was as follows:

"SEC. 36. That all acts and parts of acts inconsistent with this act are hereby repealed; provided, That this act shall not be construed to repeal, alter, or amend existing laws relating to the immigration, or exclusion of, Chinese persons or persons of Chinese descent."

(32 Stats. c. 1012, p. 1221.)

The prosecution under review in that case was, as is the case here, commenced after the passage of the latter act and was for an offense under the former act. The plaintiffs in error were sentenced to the penitentiary at hard labor, Lang for the period of three years, and Lewis for the period of two years, and each to pay a fine of one hun-

dred dollars and costs of suit, and the petition in error was to reverse those judgments.

The contention was the same there as here, and the judgments were affirmed. The judges sitting in the court of appeals, however, were divided, two of them, Judges Grosscup and Baker, concurring in the affirmance of the judgments, but on different grounds,
41 and the other Judge, Jenkins, dissenting and differing with both of the other judges. Judge Grosscup based his opinion upon what his associate Judge Jenkins was pleased to term "a subtlety of grammar," holding that the word "begun" there used meant "which have already been begun or which may hereafter be begun." Thus construing the word "begun," it was not necessary for him to consider Section 13, and he refers to it in his opinion only inferentially, if at all. It is contended by counsel for the defendants here that the language used by Judge Grosscup indicated that if he had found it necessary to consider Section 13 he would have concurred with Judge Jenkins. To my mind some of that language would seem to indicate the contrary. Certainly it might have been said there, as is contended here, that the proviso contained in Section 28 might have been left out altogether, because all prosecutions under the old law would have been saved by Section 13. So that, I think we may throw out of consideration the opinion of Judge Grosscup as not in any way enlightening us upon the question here under consideration.

As I have heretofore said, Judge Jenkins cited the case of State *v.* Showers, *supra*, and declares that it is on all fours with the case then being considered. The learned judge holds that the word "begun" there used meant already begun. He quotes Section 13, and then he pursues exactly the same argument as that made by counsel for the defendants in the case at bar. I quote a portion of what he says:

"This, (referring to Section 13) without doubt, prescribes a rule of construction to be applied to every subsequent act, in the absence of an expression of a different intent in such subsequent act. (U. S. *v.* Reisinger, 128 U. S., 398.)

But as one legislature can not bind a subsequent legislature to a particular mode of repeal, where the subsequent act contains a provision with reference to a prior act superseded by the new act, we must apply the recognized canons of construction to the language employed to ascertain the intent of the Congress.....

"We are compelled to assume that the Congress understood this. We are compelled to assume that they spoke to a purpose. The natural import of the language used, as with deference I think, can bear no other construction than that the Congress intended to say what it expressly said should be saved, and nothing else. It is not permitted to the court to say that the Congress spoke unadvisedly or unwisely, nor should violence be done to recognized rules of construction to avoid supposed mischievous results, or supposed careless legislation. *'Ita lex scripta est.'* The law has so spoken. The
42 courts should follow and obey. If injury results the responsibility is upon the legislature, not upon the court."

In this language, as with deference I think, he in effect adds to that section, and to Section 28 of the act there being considered, words which they do not contain and avoids and begs the whole question. If we should follow his reasoning we would, by an application of the rule of construction which congress has by Section 13, as to the matter now under consideration, to-wit, releases from prosecution, forbidden to the courts, add to that section and to Section 10, by implication from words which they do contain, words which they do not contain. It seems to me, as to releases from prosecution, that it may be said of Section 10, *"Ita lex non scripta est."* The law is not so written. And that it may be said of Section 13, *"Ita lex scripta est."* The law is so written. The courts should follow and obey. And that, if they fail to follow and obey, the responsibility is on the courts and not on the legislature.

Black's Law Dictionary defines the word "Express" as follows:

"Made known distinctly and explicitly, and not left to inference or implication. Declared in terms; set forth in words. Manifested by direct and appropriate language, as distinguished from that which is inferred from conduct. The word is usually contrasted with 'implied.'"

Bouvier's definition of the word "Express" is as follows:

"Stated or declared, as opposed to implied. That which is made known and not left to implication. It is a rule that when a matter or thing is expressed it ceases to be implied by law; *expressum facit cessare tacitum.*"

The American & English Encyclopedia of Law says:

"'Express' is defined as directly stated; not implied or left to inference; distinctly and pointedly given; made unambiguous by special intention; clear; plain."

Webster's Dictionary defines the word "Express" as follows:

"Directly stated; not implied or left to inference."

Worcester defines the word "Express" as follows:

"Given in direct terms; not implied; not dubious; clear; definite; explicit; plain; manifest."

The Century Dictionary defines the word 'Express" as follows:

43 "Clearly made known; distinctly expressed or indicated; unambiguous; explicit; direct; plain. In law, commonly used in contra-distinction to implied."

Section 13 is, I think, as declared by Judge Deady, in the case of U. S. *v.* Barr, (24 Fed. Cas., 1016,) a wise and salutary provision. The learned judge says:

"Section 13 is a salutary provision, and if it, or something like it, had always been incorporated in the statutes of the states or United States, it would have prevented many a lame and impotent conclusion in criminal cases in which the defendant escaped punishment because the legislature, in the hurry and confusion of amending and enacting statutes, had forgotten to insert a clause to save offenses and liabilities already committed or incurred from the effect of express or implied repeals."

It seems to me that it is wide of the mark to say that one legis-

lature can not tie the hands of subsequent legislatures. It is more to the purpose to say that the legislature can bind the hands of the courts as to rules of construction. Section 13, to my mind, evinces no attempt on the part of the congress of 1871 to bind the hands of subsequent congresses. If that argument were pursued to its ultimate conclusion, it would mean that Section 13 would only apply to the acts of the congress that passed it, and that whenever any subsequent congress, in express terms, repealed a penal statute, it by that means did away with Section 13, and clearly evinced an intention that Section 13 should not apply thereto. In the Reisinger case the Supreme Court of the United States holds exactly the contrary of this. The title of the act in which Section 13 was enacted, (which I have heretofore given,) shows clearly and beyond doubt the purpose of that section, and that it was to prescribe a rule of construction to the courts and not an attempt to tie the hands of future congresses. By Section 13 congress, in words so plain that they do not need any construction, says to the courts, as it has a right to say, that when we repeal a penal statute, you shall not release those who have violated the act repealed from punishments for violations thereof, unless the repealing act so expressly provides; unless we say expressly, not by implication, that such persons shall be released, you shall treat the repealed statute as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement thereof; if we do not say so expressly, that is, in so many words, you shall not by applying the accepted or common law rules of construction imply that we have intended to release such persons; if we intend to do that, we will say so in ex-
44 press terms. If this be true, the ancient maxim or rule of construction, *"Expressio unius est exclusio alterius,"* can not be invoked here.

Section 13 was a general provision of law addressed to the courts. It became a part of the general body of the law. It has been so treated ever since its passage. It was carried into the Revised Statutes of the United States of 1878, and into the United States Compiled Statutes of 1901. It is a part of the general body of the statutes of the United States now. As I have said, it was not intended to bind the hands of subsequent congresses, and could not bind them. But every subsequent congress that has not repealed it has recognized it as a part of the general body of the law and as a rule of construction to be applied by the courts to acts passed by it, as much as if it had been reenacted by such congress. The congress of 1906 so recognized it. They knew that in the hurry and confusion of amending and enacting statutes, in the pressure upon members of congress not only by reason of their having to consider all the various matters of legislation for a great nation, but also by reason of the exactions upon their time and attention as to many things not really pertaining to their legislative duties, (and of this few who have not themselves been members of congress can have any adequate appreciation,) words and phrases might inadvertently, or by mistake, or possibly by design of those in and out of congress having an interest in the particular matter legislated upon, find their

way into acts repealing penal statutes which might by the application of the accepted and common law rules of construction release from penalty those who had violated repealed acts, and it was for this reason they originally passed and have ever since recognized and kept upon the statute books Section 13 as a part of the general body of the law binding upon the courts. They showed their wisdom in recognizing that they might make mistakes or be careless or inadvertent, and thus produce mischievous results. And this Section 13 was placed by them, and has ever since its enactment been kept by them, as a [sentinal] on guard to prevent such mischievous results. They said to the courts, as plainly as words could say, You shall not, by implying from words that we do use words that we do not use, remove that sentinel. They said, as plainly as they could say, to the courts, when you come to a repealing statute of this kind you need not, indeed you shall not, use those keys you have been accustomed to use to unlock the doors of our minds, and ascertain our intention as to the release from penalty of those who have violated a repealed law. It will not be necessary for you to consider the niceties of grammatical construction as to whether a word is in the preterit or past tense, a participle, a connective, or a verbal adjective, in order to ascertain whether or not we intend to release violators of the repealed law. If we wish or intend to release such violators, we will say so in express words and not leave it to be implied or inferred. If we insert clauses which we might have left out, or which we should have left out, you shall not from that infer that we intended to put in clauses that we did not put in, and thus release violators of the law. In other words, all that is left to the courts is to say whether or not they find in the repealing act an express provision releasing offenders, or any class of offenders, from prosecution under the repealed act. If no such express provision is found they are not released. I do not find any such provision in the repealing act now under consideration.

Judge Baker bases his opinion squarely upon Section 13. In his opinion the result would be the same if the word "begun" meant only "already begun," as held by Judge Jenkins. Concurring fully, as I do, in his opinion, I quote it [because] it is perhaps expressed in better language than I have myself been able to command. He says:

"Of course, one legislative body can not tie the hands of its successors with respect to either subject-matter or method of subsequent legislation. But Section 13, as I view it, evinces no such attempt. The congress of 1871 was not addressing itself particularly to succeeding congresses, but particularly to the courts. The courts are commanded by Section 13 to treat a repealed statute as still remaining in force for punishment of violations thereof unless the court shall find that the repealing act 'expressly provides' that such repealed act shall not sustain any prosecution for its violation. The case of U. S. *v.* Reisinger, 128 U. S., 398, 9 Supreme Ct., 99, L. Ed., 480, readily distinguishable from the present case in its facts, is useful here only as showing the Supreme Court's recognition (1) of what the common law rule of construction was; (2) of the right of

congress to legislate upon the subject-matter of rules of construction; and (3) of the fact that congress by the enactment of Section 13 abrogated the common law canon of interpretation, hereinabove stated, respecting the effect of a repeal.

"If Section 13 is in force in its entirety, it is the Court's duty to apply the rule of interpretation therein laid down, and to treat the penal statute of 1875 as being alive for the purpose of sustaining every proper prosecution for the enforcement of its penalties, unless the amendatory and enlarging act of 1903 be found to contain an express provision for the forgiveness of the unconvicted. There is no pretense that the act of 1903 expressly so provides.

"If section 13 is in force in its entirety, an argument along
46 this line: The act of 1875 was superseded by the act of 1903; the effect of the supersession was to exempt all unconvicted violators of the act of 1875 from punishment unless congress has provided for their prosecution; congress in the act of 1903 has only provided that unconvicted violators against whom prosecutions were begun before March 3, 1903, may be punished; therefore unconvicted violators against whom prosecutions were begun after March 3, 1903, shall go free—is false, I think, because its keystone is the abrogated common law rule of construction."

The contention, if it is so contended, that Section 13 was partially repealed, by implication, by Section 10, but only in so far as it related to prosecution under the Elkins Law of those who had not already been indicted, is I think fully met by what I have already said, and by Judge Baker, where he says:

"Has Section 13 been repealed in whole or in part? That section furnished a complete enactment respecting one method of interpretation. Subsequent congresses were left at liberty to legislate on that subject, as on every other within their constitutional right, and in any manner they might choose. They could amend or repeal the previous legislation. They could repeal it expressly or by implication, in whole or in part. No claim is made of an express repeal. No claim is made of a general repeal by implication. An argument is advanced, as I understand it, that Section 13, has been partially repealed by implication (but only in its relation to the penal acts of 1875 and 1903), in this way: Section 13, in its application to the acts in question, provides that unconvicted violators of the act of 1875 against whom prosecutions were begun before March 3, 1903, may be punished, and also that unconvicted violators of the act of 1875 against whom prosecutions were begun since March 3, 1903, may be punished; the act of 1903 provides that unconvicted violators of the act of 1875 against whom prosecutions were begun before March 3, 1903, may be punished, but is silent respecting the fate of those unconvicted violators of the act of 1875 against whom prosecutions had not been begun by March 3, 1903; therefore that part of the general law embodied in Section 13 which by its terms would be applicable to the unconvicted violators of the act of 1875 against whom indictments were returned after March 3, 1903, has been impliedly repealed. And the maxim *'Expressio unius est exclusio alterius'* is evoked as clinching the argument. It strikes me as a

queer doctrine that silence should accomplish a repeal. It seems to me that, instead of adverting to the maxim quoted, which may properly be applied where one must choose between alternatives, attention should be given to those principles which declare that repeals by implication are not favored, that new legislation does not supersede the old by implication unless the new covers the whole subject of the old, and that the new may reaffirm (though reaffirmation is a needless work), amend or supplant parts of the old without affecting the force and validity of those parts concerning which the new is silent."

47

I can only add that it seems to me queer that congress should intend to accomplish such a repeal in such a manner. It is equivalent to saying that, although this rule of construction contained in Section 13, and addressed to the courts, directs that the repeal of a statute shall not have the effect to release from prosecution unless the repealing act shall so expressly provide, still the courts can, although there is no such express provision in the repealing act, avoid that rule and accomplish what it was intended to prevent by construing by implication that rule out of existence. It is equivalent to saying that, if we can not avoid the rule by implication or inference from the language contained in the repealing act, we can by implication or inference from that language get rid of the rule. It is equivalent to saying that, although congress has placed this sentinel on guard to prevent just such releases, the courts can use the key therein forbidden to be used to knock down and put out of the way the sentinel. This, as with deference I think, would be little less than a kind of judicial legerdemain. I can not think that the courts can thus obviate a plain, positive and unambiguous statute prescribing a rule of construction. Besides, I think that the contention is fully met by the Supreme Court of the United States in the case of Rosencrans *v.* U. S., (165 U. S., 257,) wherein the court says:

"Where Congress has expressly legislated in respect to a given matter, that express legislation must control in the absence of subsequent legislation equally express, and is not overthrown by any mere inferences or implications to be found in such subsequent legislation."

I have not been impressed by the argument drawn from the history of the legislation in reference to rates, rebates and concessions. In that argument it was asserted that those laws were an evolution and that the Hepburn Law was the final result of that evolution. It was asserted that the laws prior to the Hepburn Law, had been permitted to remain a dead letter upon the statute book. It was asserted that the Elkins Law was a harsh and stringent law, subjecting those who had given or accepted rebates or concessions, not knowing that they were giving or accepting such rebates or concessions, to its penalties, and that congress, recognizing this, amended and superseded that law by the Hepburn Law; that by inserting the word "Knowingly" in the Hepburn Law it evinced its recognition of the harshness of the Elkins

48

Law, and that this throws light upon the repealing section of the Hepburn Law, and strengthens the contention that it was the intention of congress to release from prosecution under the former law those against whom prosecutions had not already been begun. In answer to this it might be said, that it may well be questioned whether those laws had been permitted to remain a dead letter, but that, on the contrary, numerous efforts had been made and were being made to enforce them; and it might also be said that congress did not recognize the harshness of the Elkins Law by inserting in the amendment thereto the word "knowingly," but inserted that word for another and a very good reason. The punishment prescribed by the Hepburn Law amending and superseding it is fine or imprisonment in the penitentiary for a term not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Does it not strike one with much greater force that the word "knowingly" was inserted because the offense had thus been made an infamous one? In view of what I have already said, if I am correct in the conclusion reached, this argument is without force, because it proceeds upon the assumption that we may by interpretation or inference ascertain the intention of congress in reference to the release from prosecution of those who had violated the repealed law.

But if we were permitted in the face of Section 13, to accertain the intention of congress by interpretation or inference, and for that purpose could look if necessary, to the history of the legislation and of the times in which it was passed, as in that case, I think we could. (U. S. — Union Pac. R. R. Co., 91 U. S., 72) it might be well for us while we are considering, in the light of that history, what congress intended to do, also to consider, in the light of that history, what congress did not intend to do. I think that to anyone at all familiar with that history it is well known that congress at the time of the passage of the Hepburn Law was seeking to enlarge and make more effective the powers of the Interstate Commerce Commission, and was seeking, not to make the laws in reference to rates and rebates and concessions less stringent, but more stringent, and was seeking, above all things, to prevent the Interstate Commerce Commission from being sheared of its powers, and the objects of the law nullified, by proceedings in court and the necessary delays incident thereto. I think that to anyone at all familiar with the condition of the public mind or with the temper of
congress at that time it must be evident that congress did
49 not wish to release anyone from the penalties of the laws
theretofore in force, but, on the contrary, intended that all offenders against those laws should be prosecuted, and that no guilty person or corporation should escape. And I can conceive of no reason why congress should wish or intend that those whose violations had been discovered and against whom prosecutions had already been commenced, even though they might be few in number, should be prosecuted to a conclusion and should suffer the penalties incurred, and that that much larger class of offenders,

whose violations of the law had not been discovered and against whom prosecutions had not been begun, should be allowed to go free.

But even if we are permitted, in the face of Section 13, as to releases from prosecution by a repealing act, to ascertain by interpretation or inference the intention of congress, we can, by following and applying an accepted rule of construction, as binding as that contained in the maxim *Expressio unius est exclusio alterius*, ascertain the intention of congress and reconcile Section 10 and Section 13, and make them both stand together.

Sections 15 and 16 of the Interstate Commerce Act, as the same had been amended prior to the passage of the Hepburn Act, prescribe the mode of procedure before the Interstate Commerce Commission and in the courts to enforce the provisions of that law. By the Hepburn Act these sections are amended and superseded. It is contended by counsel for the government that the amendments to these sections refer only to civil procedure, and by counsel for the defendants that they refer in express terms to both civil and criminal procedure. But I think the result is the same if they refer to either, or both. By a comparison of the provisions of the Hepburn Act amending and superseding these sections of the former law, it is found that changes are made in the procedure therein provided for. Without following through every detail the amendments made in these sections by the Hepburn Law it will be sufficient to refer to only one. The expediting act of February 11, 1903, entitled "An Act to Expedite the Hearing and Determination of Suits in Equity and so Forth," applied only to causes wherein the United States is complainant. By the Hepburn Act its provisions are made applicable to all suits no matter who is complainant, brought in any of the circuit courts of the United States against the Interstate Commerce Commission to enjoin, set aside, annul, or suspend any order or requirement of the commission, including the hearing on an application for a preliminary injunction, and are also made
50 applicable to any proceeding in equity to enforce any order or requirement of the Commission, or any of the provisions of the act to regulate commerce, approved February 4, 1887, and all acts amendatory thereof or supplemental thereto.

It is admitted by both sides, and indeed it is stated by counsel for the defendants to be the A B C of the law that it is competent for congress to make changes in the mode of procedure, and that the changes thus made would be applicable to and govern the procedure in all causes pending as well as in those thereafter commenced. This being the case, the amendments to the mode of procedure made by the Hepburn Law would affect causes pending at the time of its passage as well as those thereafter brought. So that, if congress wished, as to causes then pending, to continue in force the former provisions in reference to the procedure it was necessary that they should make provision therefor. This I think furnishes us a key by which we can ascertain the intention of congress when they inserted the words "but the amendments herein provided for shall

ot affect causes now pending in courts of the United States, but ch causes shall be prosecuted to a conclusion in the manner here- fore provided by law, and it gives us a complete answer to the ntention that, unless those words are construed as counsel for the efendants would have us construe them, they are wholly meaning- ss and superfl-ous. Let us read Section 10, in which these words ecur, in connection with Section 13, as the Supreme Court of the nited States did in the Reisinger case. The two thus read together ould be as follows:—

"That all laws and parts of laws in conflict with the provisions f this Act are hereby repealed: Provided, That said repeal shall ot have the effect to release or extinguish any penalty, forfeiture, r liability incurred thereunder, unless this act shall so expressly rovide, and the same shall be treated as still remaining in force for he purpose of sustaining any proper action or prosecution for the nforcement of such penalty, forfeiture or liability; but the amend- ments herein provided for shall not affect causes now pending in ourts of the United States, but such causes shall be prosecuted to a onclusion in the manner heretofore provided by law."

And let us remember always in this connection that it is the ntention of congress to release from prosecution that we are con- sidering. It would seem to me that thus read no one could construe hat by this section congress intended to release any offenders gainst the former laws from prosecution.

But if these statutes are repugnant, as it seems to me when so read together they are not, it is a familiar rule that seemingly 51 repugnant statutes must be so construed, if possible, as that both shall stand.

"Repeals by implication are not favored and will not be decreed, unless it is manifest that the legislature so intended. As laws are presumed to be passed with deliberation and with full knowledge of all existing ones on the subject, it is but reasonable to conclude that in passing a statute it was not intended to interfere with or abrogate any former law relating to the same matter, unless the repugnancy between the two is not only irreconciliable, but also clear and con- vincing, and following necessarily from the language used, unless the later act fully embraces the subject-matter of the earlier, or unless the reason for the earlier act is beyond peradventure removed. Hence, every effort must be used to make all acts stand, and if, by any reasonable construction, they can be reconciled, the later act will not operate as a repeal of the earlier." Am. & Eng. Ency. of Law, Old Ed., Vol. 23, p. 489.

Bringing these two sections together, as I have done, and reading them together, in view of the foregoing rule can they be reconciled and both be made to stand? Let us not forget or leave out the words, "but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law." The words "in the manner" show to my mind conclusively that this last clause relates only to the mode or method of procedure. Let us read this clause in connection with the words "The amendments herein provided for shall not affect

causes now pending." Shall not affect them how? Certainly in the face of Section 13 and in connection with the word "in the manner," as to that only as to which they could affect them, namely, the procedure. And what amendments are referred to? Clearly none other than the amendments relating to the procedure. If we are to attribute to congress the wisdom and learning attributed to them in the argument, they knew that where the procedure was changed all actions, civil or criminal, whether then pending or thereafter brought, would thereafter follow the new procedure.

"Even where prosecutions and rights of action under a repealed enactment are preserved by a saving clause in the repealing act, yet, after the latter takes effect, they must be carried on and enforced in conformity with the provisions of the repealing statute, the one repealed being preserved only to the extent of furnishing the right of action or prosecution, not the practice or mode of procedure." Endlich on the Interpretation of Statutes, Sec. 487.

And, if, as to actions then pending, they wished that the former provisions as to the procedure should remain in force, as I
52 have said above, it was necessary that they should insert these words in Section 10 after the repealing words. And it seems to me that, using this language which points directly to the mode of procedure, they could have intended nothing else. It seems to me that not only may the two sections be thus clearly harmonized and made to stand together, but that they must be harmonized, and that the intention of congress is thus made clear. And I think the interpretation that congress intended by these words to release any class of offenders against the former laws from penalty, forfeiture, or liability, is a forced and perverted one.

In the foregoing I have assumed that changes have been made by the Hepburn Law in the mode of procedure not only in civil causes but also in criminal causes, as is contended by counsel for the defendants. I think, however, there is much force in the contention of counsel for the government that the words "causes now pending" were intended by congress to refer only to civil causes. Counsel for the defendants have pointed out to me provisions in the Hepburn Law making certain things criminal which had not theretofore been criminal and changing the penalties for crimes under the former laws; but these do not touch the procedure in the prosecution of such crimes, and indeed it is difficult to see, as counsel for the government contends, how such procedure could have been changed. Admitting, as I think we must admit, that the word "causes" is broad enough to include both civil and criminal causes, yet, under the rule above given in relation to reconciling seemingly repugnant statutes, if a word of broad meaning is used, but if by giving to it a narrower meaning we can reconcile the seemingly repugnant provisions, and especially if the context shows, by reasonable interpretation, that the narrower meaning was intended, it should be construed as having that narrower meaning. If we give to this word this narrower meaning, the foregoing observations apply with equal, or even greater, force.

I am, therefore, clearly of the opinion that the demurrers should be overruled.

Endorsed: Opinion of Morris J. Filed January 26 1907. 9:30 o'clock A. M. Charles L. Spencer, Clerk, By Margaret C. Noonan, Deputy.

And thereafter, and on the same day, certain proceedings were had in said Court in said action, which proceedings were duly recorded in the words and figures following, to-wit:

United States District Court, District of Minnesota, Fourth Division.

Term Minutes, October Term, A. D. 1906, January 26th, 1907.

53 SATURDAY MORNING.

Court opened pursuant to adjournment.
Present. Honorable William Lochren, Judge.

No. 3619.

THE UNITED STATES
vs.
GREAT NORTHERN RAILWAY COMPANY, BENJAMIN CAMPBELL, WILLIAM W. BROUGHTON, and GUY I. SWENEY.

Pursuant to and in accordance with the opinion of the Honorable Page Morris, Judge of this Court, filed this day in the above entitled action and an order of said Judge this day filed, it is by the Court,

Ordered: That the demurrer of the defendants to the indictment in the above entitled action be and the same hereby is overruled.

And it is by the Court further ordered: that said defendants be and each of them hereby is allowed an exception to the above order.

No. 3619.

THE UNITED STATES
vs.
GREAT NORTHERN RAILWAY COMPANY, BENJAMIN CAMPBELL, WILLIAM W. BROUGHTON, and GUY I. SWENEY.

Ordered: that this cause be and the same hereby is continued to the April term, A. D. 1907, of this Court.

And thereafter and on the 23rd day of February, A. D. 1907, certain proceedings were had in said Court in said action which proceedings were duly recorded in the words and figures following, to-wit:

United States District Court, District of Minnesota, Fourth Division.

Term Minutes, October Term, A. D. 1906, February 23rd, 1907.

SATURDAY MORNING.

Court opened pursuant to adjournment.
Present: Honorable William Lochren, Judge.

No. 3619.

THE UNITED STATES
vs.
GREAT NORTHERN RAILWAY COMPANY, BENJAMIN CAMPBELL, WILLIAM W. BROUGHTON, and GUY I. SWENEY.

On motion of Charles S. Albert, Esq., attorney for defendants in the above entitled action, Charles C. Houpt, Esq., attorney for the plaintiff in said action, consenting, it is by the Court

Ordered: That the order continuing this cause to the April
54 Term, 1907, of this Court entered on the 26th day of January, 1907, be and the same hereby is vacated and set aside.

THE UNITED STATES
vs.
GREAT NORTHERN RAILWAY COMPANY, BENJAMIN CAMPBELL, WILLIAM W. BROUGHTON, and GUY I. SWENEY.

Indictment No. 3619 under Acts of Feb. 4, 1887, and Feb. 19, 1903.

And now each of the defendants in the above entitled action appears at the bar of this Court by Charles S. Albert, attorney for all of said defendants, the plaintiff appearing by Charles C. Houpt, Esq., its attorney, and for plea to the indictment in said action each of said defendants by his said attorney doth say that he is not guilty.

No. 3619.

THE UNITED STATES
vs.
GREAT NORTHERN RAILWAY COMPANY, BENJAMIN CAMPBELL, WILLIAM W. BROUGHTON, and GUY I. SWENEY.

Ordered: that this cause be and the same hereby is continued to the April term, A. D. 1907, of this Court.

And thereafter and on the 2nd day of April, A. D., 1907, certain proceedings were had in said court in said action which proceedings were duly recorded in the words and figures following, to-wit:

United States District Court, District of Minnesota, Fourth Division.

Term Minutes, April Term, A. D. 1907, April 2nd, 1907.

Present: Honorable William Lochren, Judge.

THE UNITED STATES
vs.
GREAT NORTHERN RAILWAY COMPANY, BENJAMIN CAMPBELL, WILLIAM W. BROUGHTON, and GUY I. SWENEY.

Indictment No. 3619.

Upon motion of Rome G. Brown, Esq., attorney for all of the defendants in the above entitled action, it is by the Court
Ordered: That Benjamin Campbell, William W. Broughton, and Guy I. Sweney, defendants in the said action, be and they hereby are granted a trial upon the indictment in said action separate and apart from the trial of the defendant, Great Northern Railway Company, upon said indictment, numbered 3619.

55 And thereafter and on the 6th day of April, A. D. 1907, certain proceedings were had in said court in said action, which proceedings were duly recorded in the words and figures following, to-wit:

United States District Court, District of Minnesota, Fourth Division.

Term Minutes, April Term, A. D. 1907, April 6th, 1907.

SATURDAY MORNING.

Court opened pursuant to adjournment.
Present: Honorable Page Morris, Judge.

THE UNITED STATES
vs.
GREAT NORTHERN RAILWAY COMPANY, BENJAMIN CAMPBELL, WILLIAM W. BROUGHTON, and GUY I. SWENEY.

Indictment No. 3619 under Acts of February 4th, 1887, and February 19th, 1903.

The above entitled action came on this day to be tried as to the defendant, the Great Northern Railway Company, heretofore by order of this court duly granted a trial separate from that of the other defendants in said action, said defendant appearing by its attorneys, Rome G. Brown, Esq., and Charles S. Albert, Esq., and the plaintiff appearing by Charles C. Houpt, Esq., and Paul A. Ewert, Esq., its attorneys. Whereupon, on motion of plaintiff's

attorney this action is ordered for trial and a jury, being called, comes as follows, to-wit: Thomas Galvin, James Donovan, Henry Urban, G. E. Burnett, W. R. Sommerville, Frank D. Willis, H. M. Ball, Frank G. O'Brien, Archibald A. Doolittle, Stephen A. Terhune, J. A. Chalmers and Morris E. Moore, being twelve free and lawful men who are duly empanelled and sworn to try the issues joined herein as to the defendant, the Great Northern Railway Company.

Mr. Ewert opens the case on the part of the plaintiff.

Mr. Brown, attorney for said defendant, addresses the Court, makes certain motions and admissions of fact whereof a record is made by the stenographer, together with the action of the court thereon and defendant's exceptions thereto, and the cause is submitted without argument to the jury.

The jury is charged by the Court and retire under the charge of an officer duly qualified and sworn to keep them to consider of their verdict and thereafter the said jury returning into court and being called and all being present, the said jury do render their written verdict in the words and figures following, to-wit:

56 "United States District Court, District of Minnesota, Fourth Division.

THE UNITED STATES OF AMERICA, Plaintiff,
against
GREAT NORTHERN RAILWAY COMPANY, BENJAMIN CAMPBELL, WILLIAM W. BROUGHTON, and GUY I. SWENEY.

Verdict Upon Indictment No. 3619 as to the Great Northern Railway Company.

"We, the Jury in the above entitled action, do find the defendant, the Great Northern Railway Company, guilty as charged in the Indictment.

Dated April 6th, 1907.

THOMAS GALVIN, *Foreman.*"

And thereupon Mr. Brown, attorney for said defendant, moves that judgment upon said verdict be arrested and it is by the Court

Ordered: that the motion herein in arrest of judgment be and the same hereby is overruled and denied.

And to the order last aforesaid said defendant by its said attorney, Rome G. Brown, Esq., duly excepts.

And thereupon the attorneys for the plaintiff move that judgment be entered against and sentence pronounced upon said defendant and said defendant being inquired of whether it has anything to say why judgment and sentence should not now be entered and pronounced and nothing being said by its said attorney, it is by the Court in accordance with said verdict,

Considered and adjudged that the said defendant, the Great Northern Railway Company, is guilty as charged in each count of the indictment herein and that as punishment the said defendant, the Great Northern Railway Company, do pay a fine of fifteen thousand dollars ($15,000.00), the same being a fine of one thousand dollars upon each count of the fifteen counts of said indictment.

And thereafter and on the 9th day of April, A. D. 1907, a certain settled case and bill of exceptions was filed in said court in said action, which said settled case and bill of exceptions are in the words and figures following to-wit:

District Court of the United States of America for the District of Minnesota, Fourth Division.

57 THE UNITED STATES, Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, B. CAMPBELL, W. W. BROUGHTON, G. I. SWENEY, Defendants.

Settled Case and Bill of Exceptions.

At a stated Term of the District Court of the United States of America, for the District of Minnesota, which was begun and held at the City of Minneapolis, within and for the District aforesaid, on the first Tuesday in April, being the second day of April, in the year of our Lord, 1907, this cause came on for hearing upon the 6th day of April, 1907, before the Honorable Page Morris, Judge of said court, and a jury; Messrs. Charles C. Haupt and Paul A. Ewert, attorneys appearing for the United States, and Rome G. Brown and Charles S. Albert, attorneys appearing for the defendants, when the following proceedings were had, to-wit:

It was agreed between the attorneys for the United States and the attorneys for the defendants, that the said Great Northern Railway Company should be the only one of said defendants whose trial should be taken up at said April Term.

The jury having been selected and sworn, and the taking of testimony about to begin, the following proceedings were had:

Mr. BROWN: I desire on behalf of defendant, in order to save our rights upon the law questions involved, to make objection to the introduction of any evidence. And I desire to have it understood and agreed between the Government and the defendant that I may now enter this objection with the same force and effect as if a witness had already been called and sworn to testify in behalf of the Government.

Mr. EWART: In behalf of the Government, I consent to that.

Mr. BROWN: In behalf of the defendant, then, I object to the introduction of any evidence by the Government, which objection is based upon the following grounds:

1. That neither the indictment, on which this prosecution is based, nor any count in the said indictment, states sufficient facts or grounds to constitute against the defendant an offense against the laws of the United States, nor any offense;

2. That the statute, or statutes, of the United States creating the offense or offenses, pretended to be charged in the said indictment, and in each count thereof, and upon which statutes the said
58 indictment and each count thereof is based, had been duly repealed and were not in force, as to any of the offenses in the said indictment pretended to be charged, at the time when the said indictment was found.

The COURT: I understand that last ground. Let us see the first ground.

Mr. BROWN: The first graund is the general ground of the insufficiency of the indictment. The second is the same thing, only more specific.

I think the objection will be sufficient if confined to the first one.

The COURT: The real point that you wish to make is that there can be no prosecution here, no matter what the evidence is, because of the repeal of this Elkins Act by the Hepburn Act.

Mr. BROWN: That is right.

The COURT: The objection will be overruled.

Mr. BROWN: I would ask an exception to the ruling of the court.

The COURT: An exception is allowed.

Mr. BROWN: It has been agreed for the Government, represented by its District Attorney, and the defendant, the Great Northern Railway Company, represented by its attorneys in this case, that upon this trial there shall be made by and in behalf of the defendant, the Great Northern Railway Company, the following admissions of fact; and that such agreement for such admissions is made subject to the right of the defendant to make such objections and motions and to take such action, either in this court or upon appeal, as shall be deemed necessary and proper to have determined the questions of the sufficiency of the indictment to state an offense and the sufficiency of the facts admitted to state an offense; and it is further agreed that neither such admissions, nor the fact that they have been made in this trial, shall be used as evidence or otherwise upon any other trial of this case, or upon the trial of any other case. Accordingly, in behalf of the defendant I make the following admissions:

I.

It is admitted upon the part of the said defendant that the Great Northern Railway Company was before and at all times mentioned in the several counts of this indictment, and now is a corporation duly organized, created and existing under and by virtue of the laws of the State of Minnesota, and that during all of the said
59 times it was a common carrier engaged in the transportation of property wholly by railroad in interstate commerce over its railway route from the City of Minneapolis in the County of Hennepin and State of Minnesota, through the States of Minnesota, North Dakota, Montana and Idaho, to the Cities of Spokane, Seattle

and Bellingham in the State of Washington, and as such corporation was during all of the time mentioned in said indictment, a common carrier subject to the provisions of the Act of Congress approved February 4, 1887, entitled "An Act to regulate commerce" and also the acts amendatory thereof to and including that certain act entitled "An act to further regulate commerce with foreign nations and among the states" approved February 19, 1903.

II.

The defendant admits it, the defendant the Great Northern Railway Company, acquiesced and concurred in the filing with the Interstate Commerce Commission of the United States of that certain tariff here known as "No. 4-C, Trans-Continental Freight Bureau West-Bound Tariff, naming class and commodity rates," effective January 18th, 1904, being I. C. C. No. A-1382, together with the amendments thereto known as Supplements Numbers 1 to 19 inclusive, and adopted the said rates and schedules therein named as far as the same applied to shipments over the railroad route of the said Great Northern Railway, at the time of the filing of the same, and that the said tariffs, were, before and during all the times mentioned in said indictment, on file with the Interstate Commerce Commission of the United States, and had been theretofore and were, during all the times mentioned in the indictment, duly posted and published by the said defendant, the Great Northern Railway Company, in the manner required by law; and that by said tariffs, rates, and schedules, the freight rates were fixed between the points specified in the several counts of the indictment herein at the rate respectively specified in the several counts of said indictment, that is to say in each instance the rate of fifty cents per one hundred (100) pounds.

III.

The said defendant admits that at the respective times mentioned in the several counts of the said indictment, the said W. P. Devereux Company did deliver to the said defendant, the Great Northern Railway Company, for transportation and delivery, the kinds of grain particularly set forth in each of the counts of the said indictment; that each of the respective carloads of grain so delivered as charged in the indictment was shipped under the way-bills and in the cars of the respective numbers mentioned in the several counts of
60 said indictment, that the aggregate weight of said grain in each car was in each instance as set forth in the respective counts of said indictment; that each of the cars of grain alleged in the said indictment to have been so offered for transportation to the Great Northern Railway Company was in each instance consigned to the respective consignees mentioned in each of the several counts of the said indictment, and was by the said defendant, the Great Northern Railway Company, pursuant to said delivery, shipped and transported by it in the manner, by the route, and to the place of destination as in each instance set forth in the respective counts of said indictment.

IV.

That in case of the several shipments specified in the several counts of the indictment herein the concessions stated in the several counts respectively in the said indictment were given to W. P. Devereux Company by the direction and with the consent of the said defendant, the Great Northern Railway Company.

Mr. BROWN: These admissions are made with the understanding as stated in my preliminary statement in making the admissions. If I am correct, I ask the attorney for the government to confirm that understanding of record.

Mr. EWART, representing the Government: It is agreed and understood that the admissions are made under the condition and agreement as stated by the attorney for the defendant.

Mr. EWART, representing the Government: We rest.

Mr. BROWN: We rest.

Mr. BROWN: In behalf of defendant, I move that the Court instruct the jury to return a verdict for the defendant. This motion is based upon the following grounds:

1. That neither the indictment, on which this prosecution is based, nor any count in the said indictment, states sufficient facts or grounds to constitute against the defendant an offense against the laws of the United States, nor any offense;

2. That the statute or statutes of the United States creating the offense or offenses, pretended to be charged in the indictment, and in each count thereof, and upon which statutes the said indictment and each count thereof is based, had been duly repealed and were not in force, as to any of the offenses in the said indictment pretended to be charged, at the time when the said indictment was found;

3. On the ground that the facts shown by the evidence are not sufficient to constitute against the defendant an offense against the laws of the United States, nor any offense.

61 The COURT: You admit all the material facts alleged in the indictment?

Mr. BROWN: We do.

The COURT: And practically admit that they are proved?

Mr. BROWN: We can't say that. We admit the facts that are stated here,—the government has gone over,—and I understand they are the facts of the indictment.

The COURT: For the purpose of this case, we will say that you admit those facts.

The motion will be denied, and an exception allowed the defendant.

The COURT: GENTLEMEN OF THE JURY: You are charged that if you believe the allegations contained in the indictment here in these several counts are proven by the evidence, you should find the defendant guilty as charged in the indictment. I will say that the defendant has admitted, by its counsel, that all of the material allegations of the several counts are true. If you do not believe those allegations are proven you are obliged to find the defendant not guilty. I suppose it is proper for the court to say that it can

hardly see how you can find any other verdict than that of guilty; but that is for you to say. If you do not believe these allegations are proven, you can find the defendant not guilty.

Mr. BROWN: May the defendant be allowed this exception to the court's charge: that part of the charge where the court charged the jury, substantially, that if they found the facts to be as contained in the indictment, that they should find the defendant guilty, and I would ask permission to get the words more specifically for my further exception, but that will be sufficient for now.

The COURT: That is equivalent to saying that the indictment itself is insufficient.

Mr. BROWN: Might I have that exception?

The COURT: You may.

Mr. BROWN: May I have it appear on the record that the grounds of my exception are the same three grounds named as the basis of my motion to instruct a verdict, to-wit:

1. That neither the indictment, on which this prosecution is based, nor any count in the said indictment, states sufficient facts or grounds to constitute against the defendant an offense against the laws of the United States, nor any offense;

62 2. That the statute, or statutes, of the United States creating the offense or offenses, pretended to be charged in the indictment, and in each count thereof, and upon which statutes the said indictment and each count thereof is based, had been duly repealed and were not in force, as to any of the offenses in the said indictment pretended to be charged, at the time when the said indictment was found:

3. On the ground that the facts shown by the evidence are not sufficient to constitute against the defendant an offense against the laws of the United States, nor any offense.

The COURT: You may.

The jury thereupon retired, and returned a verdict against the defendant The Great Northern Railway Company of guilty as charged in the indictment.

(Defendant's Motion in Arrest of Judgment.)

After the verdict, and before sentence, the following proceedings were had:

Mr. BROWN: In behalf of the defendant I make, in this case, the following;

Motion in Arrest of Judgment.

Now comes the defendant, the Great Northern Railway Company and moves the Court to arrest the Judgment on each and every count in the indictment herein upon which the said defendant has been convicted. This motion is based upon the following grounds:

1. That neither the indictment, on which this prosecution is based, nor any count in the said indictment, states sufficient facts

or grounds to constitute against the defendant an offense against the laws of the United States, nor any offense;

2. That the statute, or statutes, of the United States, creating the offense or offenses, pretended to be charged in the indictment, and in each count thereof, and upon which statutes the said indictment, and each count thereof is based, had been duly repealed and were not in force, as to any of the offenses in the said indictment pretended to be charged, at the time when the said indictment was found;

3. On the ground that the facts shown by the evidence are not sufficient to constitute against the defendant an offense against the laws of the United States, nor any offense.

ROME G. BROWN &
CHARLES S. ALBERT,
Attorneys for Defendant,
Great Northern Railway Company.

63 The COURT: The motion is denied.

Mr. BROWN: We ask for an exception to the ruling of the Court.

The COURT: The exception is allowed.

Mr. EWART: We move sentence at this time.

The COURT: The sentence of the court is that the defendant The Great Northern Railway Company pay a fine of $15,000., or $1,000 on each of the several counts of the indictment.

District Court of the United States, District of Minnesota, Fourth Division.

THE UNITED STATES
against
GREAT NORTHERN RAILWAY COMPANY, B. CAMPBELL, W. W. BROUGHTON, and G. I. SWENEY, Defendants.

It is hereby stipulated that the foregoing is conformable to the truth and contains all the evidence offered or introduced on the trial of the above entitled action and also the charge of the court in full, and all objections, rulings, orders and all other proceedings had upon said trial and that the same shall be settled and allowed as the settled case and bill of exceptions herein by the Honorable Page Morris, Judge of said Court, without further notice.

Dated April 9th, 1907.

CHAS. C. HOUPT,
PAUL A. EWART,
Attorneys for the United States.
WILLIAM R. BEGG,
ROME G. BROWN, &
CHARLES S. ALBERT,
Attorneys for Defendant, Great Northern Railway Company.

District Court of the United States, District of Minnesota, Fourth Division.

THE UNITED STATES
against
GREAT NORTHERN RAILWAY COMPANY, B. CAMPBELL, W. W. BROUGHTON, and G. I. SWENEY, Defendants.

I hereby certify that the foregoing case and bill of exceptions has been examined by me and found conformable to the truth and contains all the evidence offered or introduced on the trial of said cause and also the charge of said court in full, and all objections,
64 rulings, orders and all other proceedings had upon said trial, and I hereby settle and allow the same as the settled case and bill of exceptions herein.

Dated, Minneapolis, Minn., April 9th, 1907.

PAGE MORRIS, *Judge.*

Endorsed: Settled Case and Bill of Exceptions. Filed April 9th, 1907. Charles L. Spencer, Clerk.

And thereafter and on the same day a certain petition for writ of error, assignments of error and order allowing a writ of error was filed in said Court in said action, which said Petition, Writ and Assignments are in the words and figures following, to-wit:

United States District Court, District of Minnesota, Fourth Division.

THE UNITED STATES
against
GREAT NORTHERN RAILWAY COMPANY, B. CAMPBELL, W. W. BROUGHTON, and G. I. SWENEY, Defendants.

Petition by Defendant, Great Northern Railway Company, for Writ of Error.

And now comes the Great Northern Railway Company, defendant herein, and says that on or about the 6th day of April, 1907, this court entered judgment herein against this defendant, in which judgment, and the proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the Assignment of Errors, which is filed with this petition.

Wherefore, this defendant prays for the allowance of a Writ of Error in this behalf from the United States Circuit Court of Appeals for the Eighth Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and the papers in the

case, duly authenticated, may be sent to the said Circuit Court of Appeals for the Eighth Circuit.

WILLIAM R. BEGG,
ROME G. BROWN, &
CHARLES S. ALBERT,
Attorneys for Defendant, The Great Northern Railway Company.

United States District Court, District of Minnesota, Fourth Division.

65 THE UNITED STATES
against
GREAT NORTHERN RAILWAY COMPANY, B. CAMPBELL, W. W. BROUGHTON, and G. I. SWENEY, Defendants.

Assignments of Error by Defendant, Great Northern Railway Company.

The defendant, the Great Northern Railway Company, in this action, in connection with its petition for the Writ of Error, makes the following assignments of errors which the said defendant avers occurred in the proceedings in the said District Court in said cause, including the hearing and decision upon demurrer and proceedings upon the trial of said cause, and to the hearing and decision upon defendant's motion to arrest judgment.

1. The Court erred in overruling the demurrer of the defendant to the said indictment, and to each count thereof, and in overruling said demurrer to each count of the indictment.

2. The Court erred in holding and deciding, upon the hearing upon said demurrer, that either the said indictment, or any count thereof, stated facts sufficient to constitute against the defendant an offense under the laws of the statutes of The United States, or any offense.

3. The Court erred in overruling defendant's objection, made at the beginning of the trial, to the introduction of any evidence, and in permitting testimony to be offered and taken as against said objection.

4. The Court erred in overruling the motion of defendant, made at the close of the testimony, for an order of the Court to dismiss said prosecution and action.

5. The Court erred in refusing the request of the defendant made before the argument to the jury and before the charge of the Court to the jury, that the Court charge the jury that, under the evidence in this case, and the law applicable thereto, it is the duty of the jury to return a verdict of Not Guilty as to each and every count of the indictment.

6. The Court erred in charging the jury, in substance, that, in case they found the facts alleged in any count in the indictment to be as alleged, they should, as to such count, find the defendant Guilty.

7. The Court erred in charging the jury as follows:

"You are charged if you believe the allegations contained in the indictment here in these several counts are proven by the evidence, you should find the defendant guilty as charged in the indictment."

66 8. The court erred in charging the jury as follows:

"If you do not believe those allegations are proven, you are obliged to find the defendant not guilty. I suppose it is proper for the court to say that it can hardly see how you can find any other verdict than that of guilty; but that is for you to say. If you do not believe these allegations are proven, you can find the defendant not guilty."

9. The Court erred in denying defendant's motion to arrest judgment.

Wherefore, Defendant prays that the judgment of conviction in the said action, as to each and every count in the indictment herein upon which the defendant was convicted, be reversed.

WILLIAM R. BEGG,
ROME G. BROWN, &
CHARLES S. ALBERT,
Attorneys for Defendant, Great Northern Railway Company.

United States District Court, District of Minnesota, Fourth Division.

THE UNITED STATES
against
GREAT NORTHERN RAILWAY COMPANY, B. CAMPBELL, W. W. BROUGHTON, and G. I. SWENEY, Defendants.

Order Allowing Writ of Error to the Defendant, Great Northern Railway Company.

This 9th day of April, 1907, came the defendant, the Great Northern Railway Company, by its Attorneys, Rome G. Brown & Charles S. Albert, and filed herein and presented to the court its petition, praying for the allowance of a writ of error, also an assignment of errors, intended to be urged by the said defendant, and praying that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the court does allow the writ of error, upon the defendant giving bond according to law, in the sum of one thousand dollars, which said bond may be executed by said defendant as principal, by its attorneys herein, and of such surety or sureties as shall be approved by this court, and which shall operate as a supersedeas bond; and a stay of execution is hereby granted, pending the determination of such writ of error.

PAGE MORRIS, *Judge.*

67 Endorsed: Petition, Assignment of Error and Order Allowing Writ of Error. Filed April 9th, 1907. Charles L. Spencer, Clerk.

And thereafter and on the same day a certain appearance Bond on Writ of Error was filed in said Court in said action, which said bond is in the words and figures following, to-wit:

United States District Court, District of Minnesota, Fourth Division.

THE UNITED STATES
against
GREAT NORTHERN RAILWAY COMPANY, B. CAMPBELL, W. W. BROUGHTON, and G. I. SWENEY, Defendants.

Appearance Bond on Writ of Error.

Know all men by these presents, That we, Great Northern Railway Company as principal, and National Surety Company of New York as surety, are held and firmly bound unto the United States of America in the full and just sum of one thousand dollars ($1000), to be paid to the United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this sixth day of April, in the year of our Lord, one thousand nine hundred and seven.

Whereas, lately at the April term, A. D. 1907, of the District Court of the United States for the District of Minnesota, Fourth Division, in a suit depending in said court between the United States of America, plaintiff, and Great Northern Railway Company, B. Campbell, W. W. Broughton and G. I. Sweney, defendants, a judgment and sentence was rendered against the said Great Northern Railway Company, and the said Great Northern Railway Company has obtained a writ of error from the United States Circuit Court for the District of Minnesota, to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing the United States of America to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the date of said citation, which citation has been duly served.

Now the condition of the above obligation is such that if the said Great Northern Railway Company shall appear either in person or by attorney in the United States Circuit Court of Appeals for the Eighth Circuit on such day or days as may be appointed
68 for the hearing of said cause in said Court and prosecute his said writ of error and shall abide by and obey all orders made by the United States Circuit Court of Appeals for the Eighth Circuit in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said Court may direct, if the judgment and sentence against him shall be affirmed; and if

he shall appear for trial in the District Court of the United States for the District of Minnesota, Fourth Division, on such day or days as may be appointed for a re-trial by said District Court and abide by and obey all orders made by said Court provided the judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Eighth Circuit; then the above obligation to be void, otherwise to remain in full force, virtue and effect.

GREAT NORTHERN RAILWAY COMPANY,
By ROME G. BROWN &
CHARLES S. ALBERT,
Its Attorneys.
NATIONAL SURETY COMPANY,
By C. V. HUNSAKER,
Attorney in Fact.
[Corporate Seal.]

Witness:
W. C. VAUGHAN.
I. C. BEMLEN.

STATE OF MINNESOTA, *County of Hennepin, ss:*

On this 8th day of April A. D. 1907, before me appeared C. V. Hunsaker to me personally known, who being by me duly sworn, did say that he is the attorney in fact of the National Surety Company, the corporation described in and who executed the foregoing instrument, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors, and said C. V. Hunsaker acknowledged said instrument to be the free act and deed of said corporation.

[Notarial Seal: Notary Public, Hennepin County, Minnesota.]

I. C. BEMLEN,
Notary Public, Hennepin County, Minnesota.

My commission expires Feb. 23, 1911.

STATE OF MINNESOTA, *County of Hennepin, ss:*

On this 9th day of April, A. D. 1907, before me personally appeared Charles S. Albert, to me known to be one of the attorneys for the above named Great Northern Railway Company, and who
60 executed the foregoing instrument in behalf of said Great Northern Railway Company, and acknowledged that he executed the same as the free act and deed of said Great Northern Railway Company.

MARGARET BEVAN,
Notary Public, Hennepin County, Minnesota.

My commission expires Jan. 26th 1913.

The foregoing bond is hereby approved.
April 9th 1907.

PAGE MORRIS, *Judge.*

(Endorsed:) Appearance Bond on Writ of Error. Filed April 9th 1907. Charles L. Spencer, Clerk.

And thereafter and on the same day a certain citation with admission of service thereof by attorney for said plaintiff was filed in said Court in said action, which said Citation is hereunto annexed and included within the paging hereof.

United States Circuit Court of Appeals for the Eighth Circuit.

UNITED STATES OF AMERICA, *Eighth Judicial Circuit, ss:*

To the United States, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Eighth Circuit, to be holden at the City of St. Louis, Missouri, in said circuit, sixty (60) days from and after the day this citation bears date, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Minnesota, Fourth Division, wherein Great Northern Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Page Morris, Judge of the District Court of the United States for the District of Minnesota this 9th day of April, A. D. 1907.

PAGE MORRIS,
Judge of the District Court of the United States for the District of Minnesota.

Original. United States District Court District of Minnesota Fourth Division. The United States *vs.* Great Northern Railway Company, B. Campbell, W. W. Broughton and G. I. Sweney,
70 Defendants. Citation. Due and personal service of the within citation is hereby admitted at Minneapolis, Minnesota, this 9th day of April, A. D., 1907, Chas. C. Houpt, United States attorney and attorney for plaintiff. Rome G. Brown & Charles S. Albert, attorneys for Defendant, Great Northern Ry. Co., 1006-1012 Guaranty Building, Minneapolis, Minnesota. Filed April 9th, 1907. Charles L. Spencer, Clerk.

And thereafter, and on the same day a certain Writ of Error from the United States Circuit Court of Appeals for the Eighth Circuit was filed in said Court in said action, which said Writ of Error and Clerk's certificate of obedience thereto is hereunto appended.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the District Court of the United States for the District of Minnesota, Fourth Division, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, at the April Term, 1907, thereof, between The United States, Plaintiff, and Great Northern Railway Company *et al.*, Defendants, a manifest error hath happened, to the great damage of the said Great Northern Railway Company as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid at the City of St. Louis, Missouri, and filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, on or before the eighth day of June, 1907, to the end that the record and proceedings aforesaid, being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of
71 the Supreme Court of the United States, this 9th day of April, A. D. 1907.

Issued at office in Minneapolis, Minnesota, with the seal of the Circuit Court of the United States for the District of Minnesota, Fourth Division.

[Seal U. S. Circuit Court, Dist. of Minnesota, Fourth Division.]

HENRY D. LANG,
Clerk of the Circuit Court of the United States of America for the District of Minnesota.

Allowed by:
PAGE MORRIS, *Judge.*

Filed April 9th, 1907.

CHARLES L. SPENCER, *Clerk.*

UNITED STATES OF AMERICA,
District of Minnesota, Fourth Division, ss:

In obedience to the command of the within writ, I herewith transmit to the United States Circuit Court of Appeals, a duly certified transcript of the record and proceedings in the within entitled cause, with all things concerning the same.

In Witness Whereof, I hereto subscribe my name and affix the seal of the District Court of the United States for the District of Minnesota, Fourth Division.

[Seal U. S. Dist. Court, Dist. of Minnesota, Fourth Division.]

CHARLES L. SPENCER,
Clerk of the District Court of the United States of America for District of Minnesota.

UNITED STATES OF AMERICA:

District Court of the United States, District of Minnesota, Fourth Division.

I, Charles L. Spencer, Clerk of said District Court, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Eighth Circuit, that the foregoing, consisting of 108 pages, numbered consecutively from 1 to 108, inclusive, is a true and complete transcript of the Records, Process, Pleadings, Orders, Final Judgment and Sentence and all other proceedings in said cause, wherein The United States is plaintiff and Great Northern Railway Company is defendant, and of the whole thereof, as appears from the original records and files of said Court; and I do further certify and return, *and* I have annexed to said tran-
72 script, and included within said paging, the original citation, together with the proof of service thereof.

In Witness Whereof, I have hereunto set my hand, and affixed the seal of said Court, at Minneapolis, in the District of Minnesota, this 10th day of April, A. D. 1907.

[Seal U. S. Dist. Court, Dist. of Minnesota, Fourth Division.]

CHARLES L. SPENCER, *Clerk.*

United States District Court, District of Minnesota, Fourth Division. The United States, Plaintiff, *vs.* Great Northern Railway Company, Defendant. Return to Circuit Court of Appeals.
Filed Apr. 13, 1907. John D. Jordan, Clerk.

73 (*Clerk's Certificate to Printed Record.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing printed record in the case of the Great Northern Railway Company, Plaintiff in Error, *vs.* The United States, No. 2603, was printed under my supervision and is identical with the printed record upon which said cause was heard and decided in the Circuit Court of Appeals.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth

Circuit, at office in the City of St. Louis, Missouri, this fourteenth day of October, A. D. 1907.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

74 Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the September Term, 1907, of said Court, begun and held at the United States Court House in the City of Denver, Colorado, on the first Monday in September, to-wit: the second day of September, A. D. 1907, before the Honorable Willis Van Devanter and the Honorable Elmer B. Adams, Circuit Judges, and the Honorable John A. Riner, District Judge.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it Remembered that heretofore, to-wit: on the thirteenth day of April, A. D. 1907, a transcript of record, pursuant to a writ of error directed to the District Court of the United States for the District of Minnesota, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein the Great Northern Railway Company was Plaintiff in Error and The United States was Defendant in Error, which said transcript of record was filed and docketed in said Circuit Court of Appeals as No. 2603.

That thereafter the following proceedings were had in said cause, in said Circuit Court of Appeals, viz:

75 (*Appearance of Counsel for Plaintiff in Error.*)

On the seventeenth day of April, A. D. 1907, the appearance of counsel for plaintiff in error was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2603.

GREAT NORTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA.

The Clerk will enter *my* appearance as Counsel for the Plaintiff in Error.

WILLIAM R. BEGG, *St. Paul.*
ROME G. BROWN,
CHARLES S. ALBERT,
Minneapolis.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2603. Great Northern Railway Company, Pl'ff in Error, *vs.* The United States of America. Appearance. Filed Apr. 17, 1907, John D. Jordan, Clerk. William R. Begg, Rome G. Brown, Charles S. Albert, Counsel for Pl'ff in Error.

(*Appearance of Counsel for Defendant in Error.*)

And on the twenty-second day of April, A. D. 1907, the appearance of counsel for defendant in error was filed in said cause, in the words and figures following, to-wit:

U. S. Circuit Court of Appeals, Eighth Circuit.

No. 2603.

GREAT NORTHERN RAILWAY CO., Pl'ff in Error,
vs.
THE UNITED STATES, Def't in Error.

The Clerk will enter my appearance for the United States of America in above case.

CHAS. C. HOUPT,
U. S. Attorney.

76 (Endorsed:) No. 2603. United States Circuit Court of Appeals, Eighth Circuit. Great Northern Ry. Co., Pl'ff in Error, *vs.* United States of America, Def't in Error. Appearance. Chas. C. Houpt, U. S. Attorney — for the Def't in Error United States of America. Filed Apr. 22, 1907, John D. Jordan, Clerk.

(*Argument Commenced.*)

And on the seventh day of June, A. D. 1907, in the record of the proceedings of said Circuit Court of Appeals is an entry in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1907.

FRIDAY, *June* 7, 1907.

No. 2603.

GREAT NORTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA.

In Error to the District Court of the United States for the District of Minnesota.

This cause having been called for hearing in its regular order, *and* by consent of counsel one hour additional time is allotted to Mr.

Thomas Wilson for oral argument as *amicus curiæ*, whereupon, argument was commenced by Mr. Rome G. Brown in behalf of plaintiff in error and continued by Mr. Thomas Wilson as *amicus curiæ*, and the hour for adjournment having arrived further argument is postponed until tomorrow.

(*Order of Submission.*)

And on the eighth day of June, A. D. 1907, in the record of the proceedings of said Circuit Court of Appeals is an order of submission in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1907.

SATURDAY, *June* 8, 1907.

77 No. 2603.

GREAT NORTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA.

In Error to the District Court of the United States for the District of Minnesota.

This cause having been called for further hearing, argument was continued by Mr. Thomas Wilson, as *amicus curiæ*, by Mr. Charles C. Houpt for defendant in error and concluded by Mr. William R. Begg for plaintiff in error.

Thereupon, this cause was submitted to the Court on the transcript of record from said District Court and the several briefs of counsel and others filed herein.

(*Opinion.*)

And on the twenty-third day of September, A. D. 1907, an opinion of said United States Circuit Court of Appeals was filed in said cause, in the words and figures following, to-wit:

78 United States Circuit Court of Appeals, Eighth Circuit.

No. 2603, September Term, A. D. 1907.

GREAT NORTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
THE UNITED STATES, Defendant in Error.

In Error to the District Court of the United States for the District of Minnesota.

Mr. William R. Begg and Mr. Rome G. Brown (Mr. Charles S. Albert was with them on the brief) for plaintiff in error.

Mr. Charles C. Houpt, United States Attorney (Mr. Paul A. Ewart,

Assistant United States Attorney, was with him on the brief) for defendant in error.

Mr. Thomas Wilson was also heard orally and by brief, and a further brief was submitted by Mr. H. S. Priest and Mr. F. W. Lehmann.

Before Van Devanter and Adams, Circuit Judges, and Riner, District Judge.

Syllabus.

1. STATUTES—GENERAL REPEALING CLAUSE.—A clause generally repealing "all laws and parts of laws in conflict with" the act of which it is a part, repeals nothing that would not be equally repealed without it.
2. SAME—LATER ACT COVERING WHOLE SUBJECT OF PRIOR ONE.—The rule that a later act covering the whole subject of a prior one and embracing new provisions, plainly showing that it was intended as a substitute, operates by implication to repeal the prior act, is subject to the qualification that where the later act expresses the extent to which it is intended to repeal prior laws, as by a clause repealing all laws and parts of laws in conflict therewith, it excludes any implication of a more extended repeal.
3. SAME—REENACTMENT WITH AMENDMENTS.—Statute law is not abrogated or annulled by mere reenactment or repetition, and when, for purposes of enlargement, contraction or otherwise, a statute is reenacted or repeated with amendments, the amendatory act is to be regarded as an affirmation and con-
79 tinuation of the prior law, in so far as in substance and operation it is the same, and is to be regarded as new legislation only in so far as in substance or operation it differs from the prior law.
4. SAME—SEC. 1 OF ELKINS ACT, 32 ST. 847, NOT WHOLLY REPEALED BY HEPBURN ACT, 34 ST. 584.—In so far as Sec. 1 of the Elkins Act, 32 St. 847, provided for the punishment of acts of corporate carriers in knowingly offering, granting or giving, as also the acts of corporate shippers in knowingly soliciting, accepting or receiving, rebates, concessions or discriminations from the legal rates and tariffs, it was not abrogated or repealed by the Hepburn Act, 34 St. 584, but was preserved and continued; and in so far as it provided for the punishment of such acts, when not knowingly done—assuming, but without deciding, that it did so provide—it was repealed.
5. SAME—CONGRESS CANNOT LIMIT MANNER IN WHICH ITS WILL SHALL BE MANIFESTED IN THE FUTURE.—While Congress may prescribe rules affecting the construction of after legislation, which does not in terms, or by necessary implication, show that it is to be unaffected by them, these rules cannot be so framed as to defeat the plain intention of after legisla-

tion, and, like other statutes, they cease to be effective when plainly or necessarily in conflict with a later manifestation of the legislative will.

6. SAME—REV. ST., SEC. 13, CONSTRUED.—As applied to subsequent repealing acts which do not expressly, or by necessary implication, contravene its provisions, Rev. St., Sec. 13, prescribing the effect of a repealing act upon existing penalties, forfeitures and liabilities, is effective and obligatory upon the courts, but beyond this it is without effect and not obligatory upon any one. Notwithstanding its enactment, Congress remains at liberty to legislate respecting its subject matter in any manner they may choose.

7. SAME—INTENTION IS CONTROLLING, THOUGH RESTING ONLY IN NECESSARY IMPLICATION.—The intention of the legislature constitutes the law and may be as effectually manifested by what is necessarily implied as by what is expressed, and where there are conflicting manifestations of the legislative will the last is controlling, even though it rests in necessary implication.

8. SAME—REPEAL BY IMPLICATION.—To establish a supersession or repeal of a statute by implication it is not sufficient to show merely that a later statute, making no mention of the particular subject of a prior one, employs language broad enough to cover some part or all of it; for, as words are sometimes employed with less than their largest literal meaning, it must also appear that the two statutes cannot stand together, reasonable purpose and operation being accorded to each. Particularly is this true if the prior statute expresses a settled policy in legislation.

9. SAME—REV. ST., SEC. 13, NOT SUPERSEDED BY SPECIAL SAVING CLAUSE IN HEPBURN ACT, 34 ST. 584.—The special saving
80 clause in section 10 of the Hepburn act, 34 St. 584, does not mention the particular subject of the general saving clause in Rev. St., Sec. 13, namely, the effect upon existing penalties, forfeitures and liabilities of a repealing act, and can be accorded reasonable operation, consistently with the true intendment of its language and with the undisturbed operation of the general saving clause, by treating it as saving causes then pending in the courts of the United States from what, in its absence, and in the presence of the general saving clause, would be the effect upon them of the amendments provided for in that act; consequently it does not by necessary implication supersede the general saving clause or impinge upon its field of operation.

VAN DEVANTER, Circuit Judge, delivered the opinion of the court:

This writ of error challenges a judgment of conviction in a criminal case whereby the Great Northern Railway Company, a Minnesota corporation engaged as a common carrier in the transportation of property wholly by railroad from points in Minnesota to points in the State of Washington, was sentenced to pay a fine of one thou-

sand dollars for each of fifteen violations of section one of the act of February 19, 1903 (32 Stat., ch. 708, p. 847), known as the Elkins act, which declared, *inter alia:*

"And it shall be unlawful for any person, persons, or corporation to offer, grant, or give or to solicit, accept, or receive any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereto whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced. Every person or corporation who shall offer, grant, or give or solicit, accept or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars."

These violations were charged in an indictment returned November 8, 1906, and, as was alleged therein and admitted upon the trial, were committed in the months of May, June, July and August, 1905, and consisted in granting and giving to the W. P. Devereux Company, a shipper of oats and corn in car load shipments from Minneapolis, Minnesota, to points in the State of Washington, over the defendant's railroad, concessions of fifteen, eighteen and twenty cents per one hundred pounds from the legal rate of fifty cents per hundred pounds named in the tariffs applicable to such shipments, as published and filed with the Interstate Commerce Commission by the defendant.

Intermediate the commission of the offense and the returning of the indictment, Congress passed the act of June 29, 1906 (34
81 Stat., ch. 3591, pp. 584, 838), known as the Hepburn act, and the chief objection interposed by the defendant to its prosecution and punishment was, that section one of the Elkins act, against which it had offended, was repealed by the Hepburn act in a manner which left no provision of law for the prosecution and punishment of offenses against the repealed statute, save where prosecutions therefor were pending in the courts of the United States at the time of the repeal. The district court overruled the objection (151 Fed. 84), and it is now very earnestly and forcefully pressed upon our consideration.

Does the Hepburn act repeal the whole or any part of section one of the Elkins act?

The title of the Hepburn act, "An act to amend an act entitled 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, and all acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," is so general that it gives no support to the claim of a repeal. Nor does that claim have any support in the general repealing clause in section ten, "all laws and parts of laws in conflict with the provisions of this act are hereby repealed," for it repeals nothing

which would not be repealed equally without it. *State v. Drexel* (Neb.), 105 N. W. 174; *State v. Yardly*, 95 Tenn. 546, 558; *Struthers v. People*, 116 Ill. App. 481; *Pierce v. Commercial Investment Co.*, 30 Wash. 272; *District of Columbia v. Sisters of Visitation*, 15 App. D. C. 300, 308. As said by Sutherland, 2 Stat. Con. 2nd ed., sec. 247: "Subsequent legislation repeals previous inconsistent legislation whether it expressly declares such repeal or not. In the nature of things it would be so, not only on the theory of intention, but because contradictions cannot stand together."

If there be a repeal, it is solely because section two of the Hepburn act declares that section one of the Elkins act "be amended so as to read as follows," and then reproduces it with some omissions and additions, which is the same thing, in legal effect, as saying that the section is amended by striking out what is omitted and by inserting at designated places what is added. In the absence of a constitutional restriction—and there is none in the constitution of the United States—the amendment of existing statutes may be effectually accomplished in either of these ways, and they have been employed interchangeably by Congress.

Generally speaking, where a statute is amended "so as to read as follows," or is reenacted with changes, or is in terms repealed and simultaneously reenacted with changes, the amendatory or reenacting act becomes a substitute for the original, which then ceases to have the force and effect of an independent enactment; but this does not mean that the original is abrogated for all purposes, or that everything in the later statute is to be regarded as if first enacted therein. On the contrary, the better and prevailing rule is that so much of the original as is repeated in the later statute without substantial change is affirmed and continued in force without interruption, that so much as is omitted is repealed, and that any substantial change in other portions, as also any matter which
82 is entirely new, is operative as new legislation. In Sutherland on Statutory Construction, 2nd ed., sec. 237, it is said of an amendment "so as to read as follows": "The amendment operates to repeal all of the section amended not embraced in the amended form. The portions of the amended section which are merely copied without change are not to be considered as repealed and again enacted, but to have been the law all along; and the new parts or the changed portions are not to be taken to have been the law at any time prior to the passage of the amended act. The change takes effect prospectively according to the general rule." And in the succeeding section it is said of a simultaneous repeal and reenactment: "Where there is an express repeal of an existing statute, and a reenactment of it at the same time, or a repeal and a reenactment of a portion of it, the reenactment neutralizes the repeal so far as the old law is continued in force. It operates without interruption where the reenactment takes effect at the same time. The intention manifested is the same as in an amendment enacted in the form noticed in the preceding section. Offices are not lost; corporate existence is not ended; inchoate statutory rights are not defeated; a statutory power is not taken away, nor pending proceed-

ings or criminal charges affected by such repeal and reenactment of the law on which they respectively depend."

The subject has been considered several times by the Supreme Court and always with the same result. *Steamship v. Joliffe,* 2 Wall. 450, 458, involved the right of a port pilot to collect half pilotage fees for services proffered and declined, and during the pendency of the action the statute giving the right was in terms repealed and at the same time substantially reenacted, the new act allowing half pilotage fees in the same circumstances as the original. The court held that the new act did not impair the right to fees which had arisen under the original, saying: "The new act took effect simultaneously with the repeal of the first act; its provisions may, therefore, more properly be said to be substituted in the place of, and to continue in force with modifications, the provisions of the original act, rather than to have abrogated and annulled them." *Murdock v. Memphis,* 20 Wall. 590, 617, to which we will refer again, related to a revisory and substituted act which, it was said, was a new law in so far as it differed from the original, and in so far as it embraced portions of the original was a preservation of them. *Bear Lake Irrigation Co., v. Garland,* 164 U. S. 1, 11, related to an act which expressly repealed and at the same time substantially reenacted a prior one, and of this it was said: "Upon comparing the two acts of 1888 and 1890 together, it is seen that they both legislate upon the same subject, and in many cases the provisions of the two statutes are similar and almost identical. Although there is a formal repeal of the old by the new statute, still there never has been a moment of time since the passage of the act of 1888 when these similar provisions have not been in force. Notwithstanding, therefore, this formal repeal, it is, as we think, entirely correct to say that the new act should be construed as a continuation of the old with the modification contained in the new act. This is the same principle that is recognized and asserted in *Steamship Co. v.*
83 *Joliffe.*" *Holden v. Minnesota,* 137 U. S. 483, 490, 494, was a criminal case involving the infliction of the death penalty. After the commission of the offense and before the indictment of the offender a statute was adopted which substantially reenacted or repeated the provisions of the previous law relating to the mode of inflicting that penalty and to the issuing of the governor's warrant therefor. It also contained new provisions imposing solitary confinement after the issuance of the warrant and regulating the details of the execution, and in terms repealed all acts and parts of acts inconsistent with it. Responding to the contention that the previous law was thereby repealed, and that the new act could not be applied to prior offenses, the court, in addition to holding that the new provision for solitary confinement, although not in terms so written, was applicable only to future offenses, held that the previous law was not repealed, and in that connection said: "These provisions were not repealed by the act of April 24, 1889. In respect to the first and second sections of that act, it is clear that they contain nothing of substance that was not in sections eleven and twelve of chapter 118 of the General Statutes of 1878. And it is equally clear that the

provisions of an existing statute cannot be regarded as inconsistent with a subsequent act merely because the latter reenacts or repeats those provisions. As the act of 1889 repealed only such previous acts and parts of acts as were inconsistent with its provisions, it is inaccurate to say that that statute contained no saving clause whatever. By necessary implication, previous statutes that were consistent with its provisions were unaffected." And again: "The provisions of the previous law, as to the nature of the sentence, the particular mode of inflicting death, and the issuing by the governor of the warrant of execution before the convict was hung, were, therefore, not repealed, although some of them were reenacted or repeated in the statute of 1889, and other provisions relating merely to the time and mode of executing the warrant, but not affecting the substantial rights of the convict, were added."

The rule announced in these cases was again recognized by the Supreme Court in *Campbell v. California*, 200 U. S. 87, 92, and was recently applied by us in *Lamb v. Powder River Live Stock Co.*, 65 C. C. A. 570, 132 Fed. 434. It has also been quite generally recognized and applied in the state courts. Instances of its application to civil statutes are shown in the following cases: *Wright v. Oakley*, 5 Met. (Mass.) 400, 406; *United Hebrew Benevolent Ass'n v. Benshimol*, 130 Mass. 325; *St. Louis v. Alexander*, 23 Mo. 483, 509; *Ely v. Holton*, 15 N. Y. 595; *Anding v. Levy*, 57 Miss. 51, 59; *Fullerton v. Spring*, 3 Wis. 667, 671; *Glentz v. State*, 38 Wis. 549; *Burwell v. Tullis*, 12 Minn. 572, 575; *Gaston v. Merriam*, 33 Minn. 271, 283; *State ex rel. v. Baldwin*, 45 Conn. 134, 144; *People v. Board of Equalization*, 20 Colo. 220, 231; *Moore v. Kenockee T'p*, 75 Mich. 332; *Capron v. Stout*, 11 Nev. 304, 310; *McMullen v. Guest*, 6 Tex. 275. And instances of its application to criminal statutes are shown in the following: *Commonwealth v. Herrick*, 6 Cush. 465; *State v. Gumber*, 37 Wis. 298; *State v. Wish*, 15 Neb. 448; *State v. Miller*, 58 Ind. 399; *Sage v. State*, 127 84 Ind. 15; *State v. Kates*, 149 Ind. 46; *State v. Herzog*, 25 Minn. 490; *State v. Prouty*, 115 Iowa, 657, 662-665; *State v. Williams*, 117 N. C. 753; *State v. Brewer*, 22 La. An. 273; *Territory v. Ruval* (Ariz.) 84 Pac. 1096; *Junction City v. Webb*, 44 Kan. 71. See also Bishop Stat. Cr., 3rd ed., secs. 152*a*, 181. Reference to the point in judgment in some of these cases will illustrate the extent of the rule which they recognize and apply. *Commonwealth v. Herrick* was a prosecution for the sale of spirituous liquor by retail in violation of a statute which was amended, after the date of the offense, by striking out the word "spirituous" and inserting "intoxicating" in its stead. It was held, Chief Justice Shaw delivering the opinion, that, as the substituted word included all that was covered by the other and more, the intent manifestly was, not to affect cases theretofore within the statute, but to bring another class within its operation, and that as to the latter it was a new law, but as to the former its continuity was not broken. *State v. Gumber* was a prosecution under a statute declaring that all "places of public resort, where intoxicating liquors are sold in violation of law shall be shut

up and abated as public nuisances upon conviction of the keeper thereof, who shall be punished" by a fine and imprisonment. Pending the prosecution the statute was expressly repealed and at the same time was reenacted without any provision for a fine or imprisonment. The court, after referring to the rule that the effect of the repeal of a statute and its reenactment at the same time is to continue it in uninterrupted operation, and after observing "And we cannot perceive that it makes any difference whether the statute be a civil or a penal one; for it is wholly a question of legisaltive intent, which is as manifest and clear in the one case as the other," held that upon the defendant's conviction, his saloon could be closed up and abated as a public nuisance and the costs of the prosecution imposed upon him, but that no fine or imprisonment could be imposed because the provision for that part of the original punishment had not been reenacted, and therefore was repealed. *State v. Wish* was a prosecution for horse stealing under a statute which, after the date of the offense, was expressly repealed and at the same time reenacted with such changes in its phraseology that the maximum imprisonment was reduced from fifteen years to ten and the minimum from three years to one. After referring to the rule that upon the unconditional repeal of a criminal statute the power to punish violations thereof is taken away, the court said: "But does this rule apply when in fact the statute has not been repealed? There would seem to be a material difference between repealing a statute and leaving nothing in its place, and simply repealing it so far as to avoid an apparent conflict between the original and amended sections of the act. In the one case the power would be entirely gone, while in the other no instant of time had passed between the repeal of the old and the taking effect of the new. The repealing act reenacts the provisions of the old statute in its very language in all respects, except in reducing the imprisonment. We hold, therefore, that where the reenactment is in the words of the old statute, and was evidently intended to continue in force the uninterrupted operation of such statute, that the new act or amendment is a mere continuation of the former
85 act, and is not in a proper sense a repeal." *State v. Miller* was a prosecution for grand larceny, the property taken being a watch of the value of twenty-three dollars. Under section 19 of the act of 1852, in force at the date of the offense, grand larceny consisted in the stealing of personal goods of another of the value of five dollars or upwards, and pending the prosecution the statute was by an amendatory act repealed in its original terms, save that the element of value was changed from five dollars or upwards to fifteen dollars or upwards. The court held that the original section was not wholly repealed, saying: "The amended statute in question is not inconsistent with the statute as it was before amendment, so far as it is applicable to the case under consideration. The only change made by the amendment was to fix the amount constituting grand larceny at fifteen dollars, instead of five. The law under both statutes made the stealing of twenty

dollars and upwards grand larceny. There has not been a *moment*, since the coming into force of the act of 1852 that the statute law of this state has not made the stealing of the amount charged in the indictment in this case grand larceny, and contained the same provisions as to the punishment thereof. It is clear to us that the law-making power never intended the repeal of the entire section 19, above mentioned, and that no rule of construction of statutes requires this court to hold that it is repealed." In *Sage v. State* the accused was convicted as an accessory before the fact to the crime of murder in the first degree. At the date of the offense the statute read: "Every person who shall aid or abet in the commission of any felony; or who shall counsel, encourage, hire, command, or otherwise procure such felony to be committed—shall be deemed an accessory before the fact, and may be tried and convicted in the same manner as if he were a principal, and either before or after the principal offender is convicted, and charged or indicted; and upon such conviction shall suffer the same punishment and penalties as are prescribed by law for the punishment of the principal." It was thereafter reenacted in an amendatory act with such changes in its phraseology that, while the elements of the crime and the punishment remained the same, the name given to the offense in the original statute was omitted and some changes were made in the matter of the procedure or remedy. In sustaining the conviction, it was held that, though in a sense such an amendatory act supersedes the act which it amends, it does not completely repeal or destroy it for all purposes; and it was added: "Principle forbids the conclusion that an amendatory statute defining an offense in substantially the same language as that employed in the statute it amends, takes away the right of the state to prosecute the offender and requires his unconditional discharge. It can not be logically affirmed, where the same offense is defined in the same way by both the earlier and the later statute, that there is an interregnum in which there was no law defining the offense. The two acts interfuse and blend so fully and compactly that it is impossible that there can be an interval when there was no law. Between the two acts there is no period of intervening time in which no offense existed." *State v. Herzog* was a prosecution under the following statute: "If any officer, agent, clerk or servant of any
86 incorporated company, or if any clerk, agent, or servant of any private person, or of any copartnership, except apprentices and other persons under the age of sixteen years, embezzles or fraudulently converts to his own use, or takes and secretes with intent to embezzle and convert to his own use, without consent of his employer *or* master, any money or property of another which has come to his possession or is under his care *by virtue of such employment*, he shall be deemed to have committed larceny." After the date of the offense, the statute was amended so as to read as follows: "If any officer, agent, clerk or servant of any incorporated company, or if any clerk, agent or servant of any private person, or of any copartnership, except apprentices

and other persons under the age of sixteen years, *or if any attorney-at-law, collector or other person who in any manner receives or collects money or any other property for the use of and belonging to another,* embezzles or fraudulently converts to his own use, or takes and secretes with intent to embezzle and convert to his own use, without the consent of his employer, master, *or the owner of the money or goods collected or received,* any money or property of another, *or which is partly the property of another and partly the property of such officer, agent, clerk, servant, attorney-at-law, collector, or other person,* which has come to his possession or under his care *in any manner whatsoever,* he shall be deemed to have committed larceny; *and in a prosecution for such crime, it shall be no defence that such officer, agent, clerk, servant, attorney-at-law or other person was entitled to a commission out of such money or property, as commission for collecting or receiving the same for and on behalf of the owner thereof: provided, that it shall be no embezzlement on the part of such agent, clerk, servant, attorney-at-law, collector, or other person, to retain his reasonable collection fee on the collection.*" For the purpose of showing in what respects the amended statute differed from the original, we have italicised those words of each not found in the other. In affirming the conviction of the accused, notwithstanding the changes in the law, it was pointed out that, save where the accused was entitled to a commission out of the money or property embezzled, etc., the amended statute covered in exactly the same way the offenses described in the original, and it was said that, "with regard to the offenses described in the latter, in a case in which the defence spoken of does not exist, the law is wholly unaffected by the changes made by the former, and continues to be exactly what it was before the changes were made. As respects such offences, the original section is not repealed, abrogated, changed or amended, but simply preserved and continued; for there never has been a moment of time since its adoption when the rule of law announced by it did not exist. So long as this rule, which is applicable to a certain class of cases, remains unchanged, it is not at all important that the amendment effected by the amended section provides for and adds other classes of cases. The law as to the original offences, save when the defence mentioned exists, is the same in every respect." *Territory v. Rural* was a prosecution for grand larceny under a statute which, after the date of the offense, was reenacted in an amendatory act so as to enlarge the enumeration of property subject to that offense. The
87 amendatory act also contained a clause in terms repealing all acts and parts of acts inconsistent with it. The property stolen, a gelding, was within the enumeration in both the original and the amendatory act, and the prosecution was sustained, because the original was neither inconsistent with nor repealed by the amendatory act, but was merely enlarged to include a class of cases not before within its operation.

In support of the contention that by its reenactment with modifications, section one of the Elkins act was entirely repealed, and hence

no prosecution for prior violations of its inhibitions respecting rebates, concessions and discriminations could be instituted thereafter "against either an individual or a corporation," counsel for the railway company rely upon such cases as *Norris v. Crocker*, 13 How. 429; *United States v. Tynen*, 11 Wall. 88; *Murdock v. Memphis*, 20 Wall. 590; *United States v. Claflin*, 97 U. S. 546; *Pana v. Bowler*, 107 U. S. 529, 538; *Tracy v. Tuffly*, 134 U. S. 206, 232, and *Murphy v. Utter*, 186 U. S. 95, from which they deduce the conclusion that where a later act covers the whole subject of a prior one, and embraces new provisions, plainly showing that it was intended as a substitute, it operates by implication, and without any repealing clause, as an unqualified repeal of the whole of the prior act. In our opinion there are two insuperable objections to this position. First, the repealing clause in the Hepburn act, "all laws and parts of laws in conflict with the provisions of this act are hereby repealed," expresses the extent to which it was intended to repeal prior laws and excludes any implication of a more extended repeal. *Henderson's Tobacco*, 11 Wall. 652, 656; *Holden v. Minnesota*, 137 U. S. 483, 491; *Patterson v. Tatum*, 18 Fed. Cas. p. 1331, No. 10830; *Gaston v. Merriam*, 33 Minn. 271, 283; *Lewis v. Stout*, 22 Wis. 234; *People v. Huntley*, 112 Mich. 569, 578. And next, the cases relied upon do not hold that a revisory or substituted act which literally or substantially reenacts or repeats portions of the original is, in respect of them, new legislation, rather than an affirmation and continuation of existing law; nor is there any reason to believe that they restrain or qualify the ruling in *Steamship Co. v. Joliffe*, *Bear Lake Irrigation Co. v. Garland*, and *Holden v. Minnesota*, *supra*. What they do hold—general expressions being read in the light of the questions necessary to be determined—is, that a later act covering the whole subject of a prior one, and embracing new provisions, plainly showing that it was intended as a substitute, supersedes the prior act, in the sense of embracing all thereof that was intended to be preserved, omitting what was not so intended and changing what was intended to be changed, and so prevents the two from being regarded as in any respect co-existent or cumulative enactments. In this there is nothing at all inconsistent with what otherwise is clear, that is, that the intention in such a case is to make a new law only in so far as the substituted act differs from the original. And such is plainly the necessary conclusion from what was said in *Murdock v. Memphis*, 20 Wall. 590, 617, one of the cases relied upon. The question there presented was one of the effect upon the twenty-fifth section of the judiciary act of September 24, 1789, produced
88 by the second section of the amendatory act of February 5, 1867, which reenacted or repeated the former with some changes and omissions, but contained no repealing clause. Of this it was said: "A careful comparison of these two sections can leave no doubt that it was the intention of Congress, by the latter statute, to revise the entire matter to which they both had reference, to make such changes in the law as it stood as they thought best, and to substitute their will in that regard entirely for the old law upon the subject. *We are of opinion that it was their intention to make*

a new law so far as the present law differed from the former, and that the new law embracing all that was intended to be preserved of the old, omitting what was not so intended, became complete in itself and repealed all other law on the subject embraced within it. The authorities on this subject are clear and uniform. The result of this reasoning is that the twenty-fifth section of the act of 1789 is technically repealed, and that the second section of the act of 1867 has taken its place. *What of the statute of* 1789 *is embraced in that of* 1867 *is of course the law now and has been ever since it was first made so. What is changed or modified is the law as thus changed or modified. That which is omitted ceased to have any effect from the day that the substituted statute was approved.*" *Norris v. Crocker* turned entirely upon the question whether, in the absence of a repealing clause, an amendatory and supplementary act covering the whole subject of the original, adding new offenses and prescribing penalties, which were altogether new and more severe, for the offenses enumerated in the original, as well as for the new ones, repealed the original so far as related to the penalty. Of course, it was held that the provisions of the amendatory and supplementary act were repugnant to those of the original in respect of the penalty, and hence there was a repeal to that extent. *United States v. Tynen* was in principle much the same. An amendatory act, covering the whole subject of the original, and adding many new offenses, prescribed for each offense named therein, as well those which were old as those which were new, a punishment which was different and more severe, in that its minimum was less, and its maximum greater, than that prescribed in the original. It was held that the two acts were repugnant in this respect and that the amendatory one operated, without any repealing clause, to repeal the other. *United States v. Claflin* is so nearly like the two cases last mentioned that what has been said of them is also applicable to it. In each the amendatory act failed to reenact or repeat enough of the original to cover the penalty or punishment for any prior offense, and so there was no occasion to consider or decide whether such portions of the original as were reenacted or repeated should be regarded as new legislation or as an affirmation and continuance of the prior law. *Pena v. Bowler* and *Tracy v. Tuffly* decided nothing, having application here, other than that a later act, plainly intended to prescribe the only rules that are to govern in respect of the subject covered by a prior one, operates, without any repealing clause, to repeal any provision in that act omitted from the other. And *Murphy v. Utter* is also distinguishable from the cases which we regard as applicable and controlling, as well as from the one now before us. The situa-
89 tion presented in that case was, that a territorial legislature, whose acts were subject to approval, disapproval or change by Congress, had attempted to repeal one of its prior acts which, in the meantime, had been reenacted with some changes by Congress. No question was presented as to whether, as respected matters transpiring between the original enactment and the reenactment, such provisions of the former as were repeated in the latter should be regarded as entirely new legislation or as speaking from the date of

their original enactment, and the real controversy was, as to whether the act of Congress, being paramount as well as later, superseded and took the place of the original territorial act in the sense of disenabling the territorial legislature from subsequently repealing it. It was held that the original was thus superseded and supplanted and that the office of Loan Commissioners created by it, and "continued by the act" of Congress was not terminated by the subsequent territorial repealing act. When the entire opinion is carefully examined, it does not sustain the extensive repeal here claimed.

From this review of adjudged cases, as also from what is deemed the better reasoning, we think the conclusion necessarily follows that statute law is not abrogated or annulled by mere reenactment or repetition, and that when, for purposes of enlargement, contraction or otherwise, a statute is reenacted or repeated with amendments, the amendatory act is to be regarded as an affirmation and continuation of the prior law, in so far as in substance and operation it is the same, and is to be regarded as new legislation only in so far as in substance or operation it differs from the prior law.

As much of section one of the Elkins act was reenacted or repeated by the Hepburn act without any change in substance or operation, we hold that the section was not wholly repealed. And so it becomes necessary to consider whether there was any substantial change in that part of it upon which the prosecution and punishment of the offense here charged depend. For the purpose of illustrating such changes as were made the section is here reproduced, the omitted portions of the original being italicized, the new matter being shown in brackets, and the balance being common to both:

"That anything done or omitted to be done by a corporation common carrier, subject to the Act to regulate commerce and the Acts amendatory thereof, which if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said Acts or under this Act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Acts or by this Act with reference to such persons except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine [of] not less than one thousand
90 dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory *thereto* [thereof], whereby any such property shall by any device whatever be transported at a less rate than that named

in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory *thereto* [thereof], or whereby any other advantage is given or discrimination is practiced. Every person or corporation [whether carrier or shipper] who shall [knowingly] offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars. *In all convictions occurring after the passage of this Act for offenses under said Acts to regulate commerce, whether committed before or after the passage of this Act, or for offenses under this section, no penalty shall be imposed on the convicted party, other than the fine prescribed by law, imprisonment, wherever now prescribed as part of the penalty being hereby abolished:* [*Provided*, That any person, or any officer or director of any corporation subject to the provisions of this Act, or the Act to regulate commerce and the Acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court]. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

"In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier [or shipper] acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier [or shipper] as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory *thereto* [thereof], or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act.

91 "[Any person, corporation, or company who shall deliver property for interstate transportation to any common carrier, subject to the provisions of this Act, or for whom as consignor or consignee, any such carrier shall transport property from one State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or foreign country, who shall knowingly by employee, agent, officer, or otherwise, directly or in-

directly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration as a rebate or offset against the regular charges for transportation of such property, as fixed by the schedules of rates provided for in this Act, shall in addition to any penalty provided by this Act forfeit to the United States a sum of money three times the amount of money so received or accepted and three times the value of any other consideration so received or accepted, to be ascertained by the trial court; and the Attorney General of the United States is authorized and directed, whenever he has reasonable grounds to believe that any such person, corporation, or company has knowingly received or accepted from any such common carrier any sum of money or other valuable consideration as a rebate or offset as aforesaid, to institute in any court of the United States of competent jurisdiction, a civil action to collect the said sum or sums so forfeited as aforesaid; and in the trial of said action all such rebates or other considerations so received or accepted for a period of six years prior to the commencement of the action, may be included therein, and the amount recovered shall be three times the total amount of money, or three times the total value of such consideration, so received or accepted, or both, as the case may be.]"

Having regard to so much of the section as defines, and prescribes the punishment for, the offense charged in the present indictment, it is seen that the literal changes therein are four in number: First, the insertion of the words "whether carrier or shipper" in the clause specifying those against whom it is directed; second, the insertion of the word "knowingly" in the clause specifying the acts made punishable; third, the omission of the provision that no punishment other than the prescribed fine shall be imposed; and fourth, the addition, by way of a proviso, of a provision that, when the offender is a person, he shall be liable to imprisonment, or both fine and imprisonment, in the discretion of the court. The first change is an immaterial one, because the language "every corporation or person who shall offer, grant or give, or solicit, accept or receive, any such rebates, concession or discrimination," as certainly includes both carriers and shippers without the inserted words as with them. As to the second change, we shall assume, but without so deciding, that the contention of counsel for the railway company, acceded to by counsel for the government, that the original definition of the offense included acts not knowingly done, and that the insertion of the word "knowingly" contracts the definition and excludes therefrom acts originally included, is included. If so, the prior law is repealed in so far as the definition is contracted, and prior offenses falling within the repeal can not now be prosecuted and punished, save as there may be some general or special saving clause applicable to them. The third and fourth changes are also immaterial here because the punishment prescribed for corporate offenders, which was only a fine, is not affected by either. And another reason why the third change is immaterial here is, that the omitted provision had refer-

ence to offenses the original punishment for which, where the offender was a person, included imprisonment, which was not true of the offense charged in this indictment. As to it the only punishment prescribed was a fine, the provision for which is repeated literally. The fourth change is, of course, inapplicable to prior offenses, punishable only by fine at the time of their commission, but whether the provision for imprisonment which it introduces, by way of a proviso, is so far separable from, and independent of, what is reenacted or repeated, as to have no effect upon the punishment, by fine, of such prior offenses, where committed by persons (See *Holden v. Minnesota,* 137 U. S. 483, 494), need not be considered now, because, however that may be, it does not affect the punishment of corporate offenders.

The situation, therefore, is this: Acts of corporate carriers in knowingly offering, granting or giving, as also acts of corporate shippers in knowingly soliciting, accepting or receiving, rebates, concessions, or discriminations are within both the original and the amended definition of the offense, and the punishment therefor is unchanged. As to them, the prior law is not abrogated or repealed, but preserved and continued; and the liability of the offender to prosecution and punishment, whether the offense was committed before or after the amendatory act, is unaffected. But in so far as the original section embraces such acts, when not knowingly done, it is undoubtedly repealed.

It is at this point that a question lying within narrow compass, but of more difficulty, is encountered. The indictment, unlike that set forth in the opinion delivered in the district court, does not, in charging the granting and giving of concessions to the W. P. Devereux Company, use the word "knowingly" or any other term of equivalent import, and so does not state a case falling within the contracted definition of the offense, and without the repeal. True, upon the trial it was admitted on behalf of the railway company that these concessions were granted and given by its direction and with its consent, but as the sufficiency of the indictment was challenged by a demurrer and by a motion in arrest of judgment, and as the admission just stated was made under a stipulation that it should not prejudice the right of the railway company to question the sufficiency of the indictment, the correctness of the rulings upon the demurrer and the motion in arrest of judgment must be determined independently of what occurred upon the trial. It, therefore, becomes necessary to inquire whether there is any general or special saving clause applicable to prior offenses falling without the contracted definition of the offense and within the repeal. This is the more difficult question.

That section thirteen of the Revised Statutes is such a general saving clause, if not superseded by something in the Hepburn act, is not only plain but fully conceded. It reads:

93 "SEC. 13. The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall

so expressly provide and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

But it is urged on behalf of the railway company that this general saving clause is superseded, so far as concerns the Hepburn act, by section ten of that act, which reads:

"SEC. 10. That all laws and parts of laws in conflict with the provisions of this Act are hereby repealed, but the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law."

It will be observed that the earlier and general statute seems to declare that it shall apply to all cases of repeal, unless the repealing act "expressly" provides that it shall have the effect of releasing or extinguishing penalties for prior offenses; and also that the later and special statute does not contain any such express provision. Because of this, it is insisted on behalf of the government that the later act does not come within the qualifying clause of the general statute, and that it is not admissible to inquire whether the later act by necessary implication manifests an intention to release or extinguish penalties for prior offenses. Such would doubtless be the effect of the general statute, if it were a constitutional provision, but, as it is not, the contention is made untenable by these well settled provisions: First, Congress cannot thus limit or restrict the manner in which its power shall be exerted, or its intention manifested, in the future (Cooley's Const. Lim., 7th ed., 174; Bishop St. Cr., 3rd ed., sec. 147; 2 Sutherland St. Con., 2nd ed., sec. 355; *Bloomer v. Stolley*, 3 Fed. Cas. p. 729 No. 1559; *Manigault v. Springs*, 199 U. S. 473, 487; *Kellogg v. Oshkosh*, 14 Wis. 623, 628; *Brightman v. Kirner*, 22 Wis. 54, 60; *Friend v. Levy*, — Ohio St. —, 80 N. E. 1036; *Wall v. State*, 23 Ind. 150, 153; *Davidson v. Witthaus*, 105 App. Div. N. Y. 182, 185; *State v. County Court*, 37 W. Va. 808, 811; *Gilleland v. Schuyler*, 9 Kan. 569, 580); second, the intention of the legislature constitutes the law and may be as effectually manifested by what is necessarily implied as by what is expressed (*Telegraph Co. v. Eyser*, 19 Wall. 419, 427; Ex parte Yarbrough, 110 U. S. 651, 658; *McHenry v. Alford*, 168 U. S. 651, 672), and third, where there are conflicting manifestations of the legislative will the last is controlling, even though it rests in necessary implication.

But it is said that, if the general statute be not effective as a limitation or restriction upon Congress, it is at least obligatory upon the courts as a rule of construction binding them to construe every subsequent repealing act, no matter what its necessary implication as leaving penalties for prior offenses unaffected, unless it expressly provides that it shall have the effect of releasing or extinguishing them. This, however, is but saying that, though Congress is not bound by the general statute in the enactment of later repealing acts, the courts are bound to construe and
94 give effect to them as if Congress were thus bound—in other words, that general statutory rules of construction may be

so framed as to defeat the manifest intention of after legislation. We think that the statement of the proposition is its refutation. The intention of the legislature, as before said, constitutes the law, and necessarily a later act, whatever its form, if only it be unaffected by any constitutional restriction and its meaning be plain, supersedes prior acts in conflict with it. Of course, the legislature may prescribe rules affecting the construction of after legislation, which does not in terms, or by necessary implication, show that it is to be unaffected by them, but they cannot be so framed as to defeat the plain intention of such legislation, and, like other statutes, they cease to be obligatory upon the courts when superseded by a later and conflicting manifestation of the legislative will. In short, our conclusion respecting the general statute is this: As applied to subsequent repealing acts, which do not expressly, or by necessary implication, contravene its provisions, it is effective and obligatory upon the courts, but beyond this it is without effect and not obligatory upon any one. Notwithstanding its enactment, Congress remained at liberty to legislate respecting its subject matter in any manner they might choose. They could change or repeal it, or supersede it, in whole or in part, as to any particular repealing act. They could do any of these things expressly or by necessary implication. And any such change, repeal or supersession, however made, would be as obligatory upon the courts as would be the general statute, if it were unaffected by after legislation.

If, therefore, section ten of the Hepburn act does not expressly or by necessary implication manifest an intention to release or extinguish penalties for prior offenses falling within the repeal, the general statute is very plainly applicable to their enforcement and requires that the repealed law be treated as continuing in force for that purpose. *United States v. Reisinger*, 128 U. S. 398. Section 10 does not expressly mention penalties for prior offenses, or their remission or enforcement. Does it by necessary implication manifest an intention to release or extinguish them, or any of them? The argument advanced in support of an affirmative answer is this: That section contains both a repealing clause and a saving clause. Some purpose must be ascribed to the latter. It can have no other purpose than to prescribe the effect of the repealing portions of the act upon penalties for prior offenses. It declares that penalties for offenses for which prosecutions were then pending in the courts of the United States shall be saved. And by necessary implication, equally effectual, it declares that other penalties shall not be saved, but released or extinguished. If all of this were true of that section, doubtless the conclusion would follow that it impliedly supersedes or repeals, *pro tanto*, the general statute, which was presumptively in the mind of Congress. *State v. Showers*, 34 Kan. 269. The argument, however, treats section ten as if it read literally or substantially as follows:

"All laws and parts of laws in conflict with the provisions of this act are hereby repealed, but such repeal shall not release or
95 extinguish any penalty for any offense heretofore committed against such law for which a criminal prosecution is now

pending in any court of the United States, and what is repealed shall be treated as still remaining in force for the purpose of sustaining any such pending prosecution for the enforcement of such a penalty."

In fact, it reads in this way:

"SEC. 10. That all laws and parts of laws in conflict with the provisions of this act are hereby repealed, but the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law."

Thus the special saving clause, although immediately following a repealing clause, does not in terms refer to a repeal, to penalties for prior offenses, to the remission or enforcement of any of them, or to pending causes for their enforcement, but to "the amendments herein provided for," to "causes now pending in courts of the United States," and to their continued prosecution "in the manner heretofore provided by law." Of course, "amendments" is broad enough to cover the partial repeal of section one of the Elkins act, for that was effected through an amendment; and what is said about "causes now pending in courts of the United States" and their continued prosecution is also broad enough to cover the enforcement of penalties for prior offenses embraced in criminal causes then pending in those courts. But does this language plainly or necessarily refer to the effect of the repeal upon the enforcement of penalties for prior offenses? We say plainly or necessarily, because to establish a supersession or repeal of a statute by implication, it is not sufficient to show merely that a later statute, making no mention of the particular subject of the first, employs language broad enough to cover some part or all of it; for, as words are sometimes employed with less than their largest literal meaning, it must also appear that the two statutes can not stand together, reasonable purpose and operation being accorded to each. Particularly is this true if the first expresses a settled policy in legislation. *Wood v. United States*, 16 Pet. 342, 362; *United States v. Gear*, 3 How. 120, 131; *Frost v. Wenie*, 157 U. S. 46, 58; *United States v. Healey*, 160 U. S. 136, 146; *Rosecrans v. United States*, 165 U. S. 257; *United States v. Greathouse*, 166 U. S. 601; *McChord v. Louisville & Nashville R. R. Co.*, 183 U. S. 483, 500. Or, as the same thing is at times differently expressed, a statute couched in clear and explicit terms is not overthrown by possible, but not necessary, implications flowing from after legislation. We shall refer briefly to two of the cases just cited, each dealing with a conflict literally more pronounced than that now before us. *United States v. Gear* arose under the public land laws. The policy of Congress to reserve from disposition under other laws public lands containing lead mines had long been expressed in an act of March 3, 1807, when an act of June 26, 1834, establishing new land districts, directed the President to cause to be offered for sale "all the lands lying in said land districts." Thus there was presented the question whether or not the later act superseded the other, there being lands of both classes in those districts; and of this the court said:

"The rule is, that a perpetual statute (which all statutes are unless limited to a particular time), until repealed by an act professing to repeal it, or by a clause or section of another act directly bearing in terms upon the particular matter of the first act, notwithstanding an implication to the contrary may be raised by a general law which embraces the subject-matter, is considered still to be the law in force as to the particulars of the subject-matter legislated upon. Thus in this case, all lands within the district mean lands in which there are, and in which there are not, minerals or lead mines; but a power to sell all lands, given in a law subsequent to another law expressly reserving lead-mine lands from sale, cannot be said to be a power to sell the reserved lands when they are not named, or to repeal the reservation. In this case there are two acts before us, in no way connected, except in both being parts of the public land system. Both can be acted upon without any interference of the provisions of the last with those of the first—each performing its distinct functions within the sphere as Congress designed they should do."

United States v. Greathouse arose under the laws relating to the prosecution of claims against the United States. Section 1069 of the Revised Statutes provided that such claims should be barred unless the peititon was filed within six years after the claim first accrued, but contained an excepting clause in favor of married women and others, including persons beyond the seas, who were permitted to sue within three years after the disability ceased. In 1887 Congress passed an act relating to the prosecution of such claims, which, in a proviso to its first section, declared that "no suit against the Government of the United States shall be allowed under this act unless the same shall be brought within six years after the right accrued for which the claim is made," but contained no excepting clause in favor of married women or others. That act also declared all acts and parts of acts in conflict with it repealed. Greathouse was beyond the seas from 1886 to 1889, when his claim accrued, and until 1894, when his suit was commenced. In answer to the Government's contention that the excepting clause in section 1069 was displaced by the later act the court held:

"The act of 1887 only superseded such previous legislation as was inconsistent with its provisions. It is true that if that act be literally construed, there is some ground for holding that Congress intended by the proviso of section 1 to cover the whole subject of the limitation of suits against the Government, in whatever court instituted. But we cannot suppose that it was intended to strike down the exceptions made in section 1069 of the Revised Statutes in favor of 'the claims of married women first accrued during marriage, of persons under the age of twenty-one years first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued.' Those exceptions were not expressly abrogated by the act of 1887, and they could be held to be repealed only by implication. But repeals by implication are not favored, and when two statutes cover in whole or
97 in part the same matter, and are not absolutely irreconcilable, effect should be given, if possible to both of them. *Frost v.*

Wenie, 157 U. S. 46, 58; *United States v. Healey*, 160 U. S. 136, 147. In conformity with this principle we must adjudge that the above proviso of section 1069 of the Revised Statutes is still in force, because not absolutely inconsistent with the last proviso of the act of 1887; consequently, that the claim of a person who was beyond the seas at the time the claim accrued is not barred until three years shall have expired after such disability is removed without suit against the Government. Although the act of 1887 prescribes the limitation for suits 'under this (that) act,' without making any exception in favor of persons under disability, it should be interpreted as if the proviso in section 1069 of the Revised Statutes were added to section 1 of that act. We could not hold otherwise without deciding, in effect, that the limitations of six years applied to claims accruing to married women and infants during their respective disabilities, as well as to the claims of idiots, lunatics and insane persons. We are unwilling to hold that Congress intended any such result."

Can reasonable purpose and operation be accorded to the special saving clause without impinging upon the purpose and operation of the general statute? If so, it is quite plain that the broad language of the former does not necessarily relate to the particular subject of the latter, and, therefore, does not by necessary implication manifest an intention to supersede or repeal it.

When we consider that the special saving clause was part of the Hepburn bill from the time of its introduction in the House of Representatives, and that the provision amending section one of the Elkins act did not become part of the bill until after it had passed the House of Representatives and was pending in the Senate, it is difficult to believe that the former has particular reference to the effect of the partial repeal wrought by the latter. And, when we consider that any ground which could have been reasonably advanced for enforcing the repealed law against offenders who were then indicted would have been equally applicable to others who, within the period prescribed by the statute of limitations, had offended in like manner, but were as yet unindicted, and also the marked contrast between the explicit and appropriate terms of the general statute, which was presumptively in the mind of Congress, and the altogether different terms of the special saving clause, it is difficult to believe that the latter has any reference to the particular subject of the former, namely, the effect of a repealing act upon the enforcement of penalties, forfeitures and liabilities incurred under the law repealed.

We turn, therefore, to the other provisions of the Hepburn act, in the light of which the special saving clause must be read, to ascertain whether or not they indicate that it has another purpose and field of operation, more consonant with reason and with its different language. That act fills twelve pages of the statutes at large and comprises eleven sections. Its purpose is that of perfecting the existing law regulatory of interstate commerce, and this is done by
98 eliminating or changing old provisions deemed unsatisfactory, and by adding supplementary or auxiliary provisions

intended to give greater strength and efficiency to the law. These changes all fall within the general category of amendments, but they differ widely in subject and operation. Some operate to repeal portions of the prior law imposing penalties, forfeitures or liabilities, and, therefore, come within the explicit terms of the general saving clause, Rev. St. Sec. 13. Others have a more immediate relation to proceedings in the courts of the United States. And still others have immediate relation to proceedings before the Interstate Commerce Commission. Within the first class is the partial repeal section one of the Elkins act resulting from the insertion of the word "knowingly." Within the second are several of the changes in section sixteen of the Interstate Commerce act, notably those relating to the procedure in the circuit courts upon petitions for the enforcement of orders of the Interstate Commerce Commission and that removing the pecuniary limitation upon the right of appeal to the Supreme Court in such cases. And within the third are the change in section fourteen, some of the changes in section fifteen and the change in the opening paragraph of section sixteen. If proper regard be had to the subject and operation of these varied changes, and also to the settled operation of the general saving clause, with which Congress was presumptively familiar, it is reasonably plain, as we think, that the special saving clause, although speaking of the amendments collectively, is directed against such of them only as, in its absence, would affect causes then pending in the courts of the United States, and is intended merely to secure the continued prosecution, in the manner theretofore provided, of such pending causes as otherwise would be affected. In the presence of the general saving clause, pending causes for the enforcement of penalties, forfeitures or liabilities would not be affected by the repeal of portions of the prior law imposing them; nor could pending causes in the courts be affected by the changes having immediate relation to proceedings before the Interstate Commerce Commission. Thus far, therefore, there was no occasion for a special saving clause in favor of causes then pending in the courts of the United States. But the changes having immediate relation to proceedings in those courts altered the situation, for they, if not restrained, would affect both pending and future causes. 2 Sutherland St. Con., 2nd ed., Sec. 674; *Railway Company v. Grant*, 98 U. S. 398; *Campbell v. Iron Mountain Silver Mining Co.*, 27 C. C. A. 646, 83 Fed. 643. Here, then, was occasion for a special saving clause, and the language of section ten appears to have been well chosen to meet it. True, in the absence of the general saving clause, that language would be broad enough to also cover part of the ground covered by it, that is, to save such penalties, forfeitures and liabilities as would be enforced by the continued prosecution of pending causes; but that is not a controlling guide to its meaning, in the presence of the general saving clause, for not only is the true intendment of language often dependent upon the circumstances in which it is used, but the state of the law when a statute is enacted is always an important factor

in its interpretation. As before indicated, the special saving
99 clause does not contain any term or expression which bears directly upon the effect of the repealing portions of the act upon existing penalties, forfeitures and liabilities; nor does it contain anything which was not reasonably appropriate to the occasion, if Congress, mindful of the existence of the general saving clause and satisfied to leave it in undisturbed operation, was solicitous merely that the amendments bearing directly upon the jurisdiction and procedure of the courts of the United States should not affect causes then pending therein. In these circumstances we are persuaded that the special saving clause can be accorded reasonable purpose and operation by treating it as intended only to save such causes from what, without it, would be the effect of the amendments upon them; and we accordingly hold that rightly interpreted it does not cover any part of the particular subject of the general saving clause, and, therefore, does not by necessary implication manifest an intention to release or extinguish penalties, for feitures and liabilities for the enforcement of which no cause was then pending.

It follows that there was no error in the rulings of the district court, and its judgment is affirmed.

Filed September 23, 1907.

100 (*Judgment.*)

And on the twenty-third day of September, A. D. 1907, in the record of the proceedings of said Circuit Court of Appeals is a judgment in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, September Term, 1907.

MONDAY, *September* 23, 1907.

No. 2603.

GREAT NORTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
THE UNITED STATES.

In Error to the District Court of the United States for the District of Minnesota.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed without costs to either party in this Court.

September 23, 1907.

101 (*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing transcript contains full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of said United States Circuit Court of Appeals (except the transcript of record from the District Court of the United States for the District of Minnesota), in a certain cause in said Court wherein the Great Northern Railway Company is Plaintiff in Error and The United States is Defendant in error, as full, true and complete as the originals of the same now remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe by name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this fourteenth day of October, A. D. 1907.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

102 The United States Circuit Court of Appeals for the Eighth Circuit.

No. 2603.

GREAT NORTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
THE UNITED STATES, Defendant in Error.

Stipulation.

It is hereby stipulated that the transcript already filed in the Clerk's office of the Supreme Court of the United States, with the petition for a writ of certiorari, be taken as a return to said writ, dated the 19th day of November, 1907.

Dated this 20th day of November, 1907.

WM. R. BEGG,
Counsel for Great Northern Railway Company.
H. M. HOYT,
Solicitor General.

(Endorsed:) No. 2603. The United States Court of Appeals for the Eighth Circuit. Great Northern Railway Company, Plaintiff in Error, *vs.* The United States, Defendant in Error. Stipulation. Filed Nov. 27, 1907. John D. Jordan, Clerk. W. R. Begg, Counsel for Great Northern Railway Co.

UNITED STATES OF AMERICA, *ss:*

e President of the United States of America to the Honorable the udges of the United States Circuit Court of Appeals for the Eighth Circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in ch Great Northern Railway Company is plaintiff in error and e United States is defendant in error, which suit was removed the said Circuit Court of Appeals by virtue of a writ of error to District Court of the United States for the District of Minnesota, we, being willing for certain reasons that the said cause and the ord and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and ceedings in said cause, so that the said Supreme Court may act reon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the ited States, the 19th day of November, in the year of our Lord thousand nine hundred and seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 20,894. Supreme Court of the United States. No. 491, October Term, 1907. Great Northern Rail- Company *vs.* The United States. Writ of certiorari. Filed Nov. 1907. John D. Jordan, Clerk.

Return to Writ.

ITED STATES OF AMERICA, *Eighth Circuit, ss:*

n obedience to the command of the within writ of certiorari in pursuance of the stipulation of the parties, a full, true and plete copy of which is hereto attached, I hereby certify that the script of record furnished with the application for a writ of iorari in the case of Great Northern Railway Company, Plaintiff Error, *vs.* The United States, is a full, true and complete transcript h all the pleadings, proceedings and record entries in said cause.

n testimony whereof, I hereunto subscribe my name and affix of the United States Circuit Court of Appeals for the Eighth uit, at office in St. Louis, Missouri, this seventh day of December, 1907.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

[Endorsed:] File No. 20,894. Supreme Court U. S., October Term, 1907. Term No. 491. Great Northern Ry. Co., itioner, *vs.* The United States. Writ of certiorari and return. ed Dec. 9th, 1907.

The Supreme Court of the United States.

OCTOBER TERM, 1907.

GREAT NORTHERN RAILWAY COMPANY,
Petitioner,

vs.

THE UNITED STATES,
Respondent.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Great Northern Railway Company, respectfully represents:

At the October, 1906, term of the United States District Court for the District of Minnesota, Fourth division, the grand jury of the United States within and for said district and division, on the 8th day of November, 1906, came into open court and presented an indictment against your petitioner and others, which indictment was filed in said court on said day.

By said indictment it was charged in fifteen separate counts that your petitioner had at divers times from May 17, 1905, to August 3, 1905 (both dates inclusive), granted to a shipper, to-wit, W. P. Devereaux Company, a lower rate than that specified in its published tariffs and schedules at the time filed and in force, for the transportation of fifteen separate shipments of property in interstate commerce, to-wit, from Minneapolis, in the state of Minnesota, to Seattle and other places in the state of Washington, in violation of section 1 of an act entitled "An act to further regulate commerce with foreign nations and among the states," approved February 19, 1903, commonly known as the Elkins Law. (Transcript, pp. 1-26.) It was not charged that the concession was knowingly granted.

On the 24th day of November, 1906, your petitioner and the other defendants named in said indictment were duly arraigned, and thereupon demurred to said indictment upon the grounds, (1) that neither the said indictment nor any count thereof stated facts sufficient to constitute, as against the defendants therein named or either of them, an offense against the laws of the United States, or any offense, and (2) that the statute of the United States creating the offense or offenses pretended to be charged in said indictment, and under which said indictment was found, had been repealed and was not in force at the time when said indictment was found and returned. (Transcript, pp. 26, 27.)

Said demurrer was argued and submitted before the Honorable William Lochren and the Honorable Page Morris, Judges of said District Court (Transcript, pp. 28, 29), and on the 26th day of January, 1907, was overruled pursuant to an opinion and order filed by the Honorable Page Morris, one of said judges. (Transcript, pp. 29-53.) Judge Lochren did not concur in said order and the opinion filed therewith, stating that in his opinion the demurrer should be sustained. (Transcript, p. 31.) Your petitioner was allowed an exception to the decree overruling said demurrer. (Transcript, p. 53.)

At the April, 1907, term of said District Court, on the 6th day of April, 1907, said indictment was duly brought on for trial as to your petitioner (it having been granted a trial separate and apart from the other defendants named therein), upon a plea of not guilty, before the Honorable Page Morris and a jury (Transcript, pp. 54, 55); and after the jury had been impanelled for the trial of said indictment, and after the prosecution had begun the production of its testimony, your petitioner objected to the introduction of any evidence under said indictment on the same grounds as those upon which said demurrer was based; which objection was overruled by the court and an exception allowed your petitioner. (Transcript, pp. 57, 58.) Thereupon your petitioner admitted substantially all the facts alleged in the indictment, which admission was taken as the evidence on said trial, and both parties rested. (Transcript, pp. 58, 60.)

Your petitioner then moved the court to instruct the jury to return a verdict of not guilty upon the same grounds as those upon which said demurrer was based, and upon the further ground that the facts shown by the evidence were not sufficient to constitute an offense; which motion was overruled and an exception allowed your petitioner. (Transcript, p. 60.) The jury returned a verdict of guilty. (Transcript, pp. 56, 62.)

After verdict and before sentence your petitioner moved the court in arrest of judgment, basing said motion upon the same grounds as those stated in its motion for a directed verdict; which motion was denied and an exception duly allowed your petitioner. (Transcript, pp. 62, 63.) Your petitioner was thereupon, on the 9th day of April, 1907, sentenced to pay a fine of fifteen thousand dollars, upon which sentence judgment of conviction was duly entered. (Transcript, p. 63.)

Upon the pleadings and a bill of exceptions duly settled your petitioner, on said 9th day of April, 1907, removed said cause by writ of error to the Circuit Court of Appeals for the Eighth Circuit. (Transcript, pp. 63-72.) On the 23rd day of September, 1907, said Circuit Court of Appeals affirmed the sentence and judgment of the lower court.

Your petitioner, by appropriate assignments of error, presented to the said Circuit Court of Appeals for its review each of the orders and rulings of the said District Court hereinabove referred to. (Transcript, pp. 65, 66.)

The precise contention of your petitioner is:

(1) That part of section 1 of an act entitled "An act to further regulate commerce with foreign nations and among the states," approved February 19th, 1903, commonly known as the Elkins law, which defined the crimes charged in the indictment and prescribed punishment therefor, had been before the indictment was returned, repealed by section 2 of an act entitled "An act to amend an act entitled 'An act to regulate commerce,' approved February 4, 1887, and all acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," approved June 29, 1906, commonly known as the Hepburn act.

(2) Congress, by section 10 of the Hepburn act, has manifested its intent that only penalties and forfeitures incurred under the Elkins law for which prosecutions were pending at the date of the passage of the Hepburn act should be saved, and that penalties and forfeitures for which prosecutions had not at that date been instituted should be remitted.

(3) Section 13, Revised Statutes, is ineffectual either (a) to prevent Congress from manifesting by such language and in such form as it chooses its intent to remit penalties and forfeitures previously incurred under the part of the Elkins law repealed by it, or (b) to prevent the courts from giving effect by their decrees to the intent manifested by Congress in section 10 of the Hepburn act.

The points stated were squarely presented by the record below. The indictment and the several counts thereof charge certain acts to have been done and completed in the months of May, June, July and August, in the year 1905. The indictment was found and returned in the said District Court on the 8th day of November, 1906. The Hepburn act was approved and became a law on the 29th day of June, 1906. The indictment does not charge that the concessions were *knowingly* granted. (Opinion of Court below, p. 15. Trans. p. 93.

Your petitioner has no right of appeal or writ of error herein to this Honorable Court, because the jurisdiction of the said Circuit Court of Appeals is by act of Congress made final in criminal causes except capital causes. The Circuit Court of Appeals has stayed its mandate until the 22nd day of November, 1907, to give time for the presentation and determination of this petition.

There are pending in the courts of the United States, in many different districts and circuits, prosecutions under indictments returned after the passage of the Hepburn act, against various carriers and shippers, for offenses against the Elkins law, committed prior to the passage of the Hepburn act, among others, the following: In the District Court of the United States for the District of Minnesota, three other indictments against your petitioner, and also indictments against the Chicago, St. Paul, Minneapolis & Omaha Railway Company, the Wisconsin Central Railway Company, and the Minneapolis & Saint Louis Railway

Company; in the District Court of the United States for the Southern District of New York, an indictment against your petitioner, and an indictment against the Northern Steamship Company; in the District Court of the United States for the Eastern District of Pennsylvania an indictment against one C. E. Campbell, the agent of your petitioner; and in the Circuit Court of Appeals for the Seventh Circuit, on writ of error to the District Court of the United States for the Northern District of Illinois, a prosecution against the Standard Oil Company of Indiana. In all of the indictments and prosecutions above referred to the same questions are presented as those involved herein.

Said questions are important and of general concern, and unless this Honorable Court shall take jurisdiction there may be diversity of opinion among the various courts of appeal before which the questions may come for decision.

Your petitioner believes that the aforesaid decree and judgment of the Circuit Court of Appeals for the Eighth Circuit in this cause is erroneous, and that this Honorable Court should, for the purpose of deciding the questions involved for all circuits, require said cause to be certified to it for its review and determination, in conformity with the provisions of the act of Congress in that case made and provided.

Your petitioner presents herewith as a part of this petition a brief showing more fully its views upon the questions stated, and a transcript of the

record in said Circuit Court of Appeals.

Wherefore, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Eighth circuit, commanding said court to certify and send to this court on a day certain, to be therein designated, a full and complete transcript of the record, and all the proceedings of the said Circuit Court of Appeals in said cause therein, entitled "Great Northern Railway Company, Plaintiff in Error, versus The United States, Defendant in Error, Number 2603," to the end that the said cause may be reviewed and determined by this court, as provided in section 6 of the act of Congress entitled "An act to establish the Circuit Court ofAppeals, and to define and regulate, in certain cases, the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, or that your petitioner may have such other or further relief in the premises as to this court may seem appropriate and in conformity with the said act; and that the said judgment of the said Circuit Court of Appeals in the said cause, and every part thereof, may be reversed by this Honorable Court.

And your petitioner will ever pray.

WM. R. BEGG,
ROME G. BROWN,
CHAS. S. ALBERT,
Counsel.

STATE OF MINNESOTA,
County of Ramsey. ss.

Wm. R. Begg, being first duly sworn, says that he is one of the counsel for the petitioner, Great Northern Railway Company; that he prepared the foregoing petition, and that the allegations thereof are true, as he verily believes.

WM. R. BEGG.

Subscribed and sworn to before me this 18th day of October, 1907.

EARLE W. McELROY,
Notary Public,
Ramsey County, Minnesota.

My commission expires April 14, 1911.

BRIEF.

I.

AS TO JURISDICTION.

The jurisdiction of this Court to issue the writ prayed for is not open to dispute. Under the act of March 3, 1891, the power of the Court in this respect extends to every cause pending in a Circuit Court of Appeals, and may be exercised at any time during such pendency, provided the cause is one which but for the provisions of the statute per-

mitting review on certiorari would be finally determined in that court.

American Constr. Co. v. Railway Co., 148 U. S. 372, 388.

Forsythe v. Hammond, 166 U. S. 506, 514.

Lau Ow Bew v. United States, 144 U. S. 58.

The jurisdiction of the Circuit Court of Appeals in this cause is final unless reviewed on certiorari, because it is a criminal cause not capital. It is submitted that the writ should issue in order that the questions involved may be finally determined for all subordinate Federal Courts.

There are pending in the various judicial districts and circuits of the United States numerous prosecutions under indictments returned after the passage of the Hepburn act, charging offenses against the Elkins law, committed prior to the passage of the Hepburn act. A decision of this Court upon the questions presented by the record in this cause may obviate the necessity for trials in many of these prosecutions, because, if petitioner's contention is sustained the prosecutions will not lie, and if the government's contention is sustained pleas of not guilty may be withdrawn and pleas of guilty entered.

II.

AS TO THE MERITS.

A.

The indictment herein was returned after the passage of the Hepburn act, and charges offenses committed and completed prior to the passage of that act, in violation of the Elkins law. That part of section 1 of the Elkins law which defined the crime attempted to be charged and prescribed the punishment therefor is:

> "Every person or corporation who shall offer, grant or give, or solicit, accept or receive any such rebate, concession or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars. In all convictions occurring after the passage of this act for offenses under said act to regulate commerce, whether committed before or after the passage of this act or for offenses under this section, no penalty shall be imposed on the convicted party other than the fine prescribed by law, imprisonment wherever now prescribed as a part of the penalty being hereby abolished."

By section 2 of the Hepburn act, that part of section 1 of the Elkins law above quoted is amended to read:

> "Every person or corporation, *whether carrier or shipper*, who shall *knowingly* offer, grant, or give, or solicit, accept or receive any such rebate, concession or discrimination, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a

fine of not less than one thousand dollars nor more than twenty thousand dollars: *Provided, that any person or any officer or director of any corporation subject to the provisions of this act or the act to regulate commerce, and the acts amendatory thereof, or any receiver, trustee, lessee, agent or person acting for or employed by such corporation who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.*"

The changes made by the Hepburn act are italicized.

The remaining portions of section 1 of the Elkins law are re-enacted without change. Some provisions are added.

The parts of the Hepburn act above quoted repeal those parts of the Elkins law above quoted, because the Hepburn act changed the character of the crime and the nature of the punishment.

Under the Elkins law it was not necessary that to be a crime the departure from tariff be knowingly made, and the indictment here involved does not charge a departure knowingly made. Under the amendment made by the Hepburn act the departure, to be criminal, must be knowingly made, and the indictment must so allege. The element of *scienter* is injected.

The punishment is changed. Under the Elkins law the only punishment prescribed was a fine. Under the amendment the punishment is a fine and *also imprisonment* of individual defendants for not to exceed two years.

Such radical changes in the nature of the crime and in the punishment prescribed necessarily, under the decisions of this and other courts, effect the repeal of the part of the Elkins law above quoted.

United States v. Tynen, 78 U. S. 88, 92.
United States v. Claflin, 97 U. S. 546, 550-551.
Norris v. Crocker, 13 How. 429.
The Paquete Habana, 175 U. S. 677, 685.
Murdock v. Memphis, 20 Wall. 590, 616.
Murphy v. Utter, 186 U. S. 95, 106.
Dist. of Col. v. Hutton, 143 U. S. 18, 26.
United States v. Fisher, 109 U. S. 143, 145.
Wharton v. State, 94 Am. Dec. 214.
People v. Tisdale, 57 Cal. 104, 106.
Telegraph Co. v. Brown, 8 N. E. 171, 172.
Lindsey v. State, 5 So. 99, 100.
State v. Allen, 44 Pac. 121, 122.
State v. Ingersoll, 17 Wis. 651, 655.
Wilson v. Railway Co., 29 Pac. 861.
Mullen v. People, 31 Ill. 444, 445.
Mongeon v. People, 55 N. Y. 613, 615.

The rule that when a statute is amended, and re-enacted as amended, those provisions which are in no wise altered are deemed to have been continued, cannot apply to the part of the Elkins law quoted above. (Authorities, supra.)

It cannot be that the Elkins law remains in force to the extent that an unintentional departure from tariff by an officer of the corporation is still a crime punishable by fine only. The act or crime of

the officer alone constitutes an act or crime of the corporation. To hold that the Elkins law remains in force as to the corporation is to penalize it, and through it innocent stockholders, while permitting the guilty officer to escape. Congress cannot have intended this.

The Circuit Court of Appeals says:

> "But in so far as the original section embraces such acts, when not knowingly done, it is undoubtedly repealed." (Printed opinion, p. 15.) Transcript p. 98

The repeal cannot be severed. The part of the Hepburn act quoted repealed *in toto* the part of the Elkins law quoted.

Goodno v. Oshkosh, 31 Wis. 127, 130.

The Hepburn act, in section 10, enacts a repeal of inconsistent laws.

B.

Section 10 of the Hepburn act is:

> "All laws and parts of laws in conflict with the provisions of this act are hereby repealed, but the amendments herein provided for shall not affect causes now pending in the courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law."

This section accomplishes three objects in addition to the repeal of inconsistent laws. It expresses the intent of Congress (1) that penalties, forfeitures and liabilities previously incurred, for which causes were pending in the courts of the United States, shall be saved; (2) that penalties,

forfeitures and liabilities previously incurred, for which actions or prosecutions had not been instituted at the date of the repeal, shall be released and remitted; (3) that as to pending causes the procedure prescribed by previous laws shall apply.

Causes are matters of the substantive law, which creates rights and provides remedies for their infringement. Procedure is a matter of the adjective law, which prescribes the forms by which matters of substantive law may be enforced or vindicated. Congress, by section 10, has spoken to matters both of substance and of form—both to causes and to the procedure therein.

The word "causes," as used in section 10 of the Hepburn act, includes criminal causes.

Blyew v. The United States, 13 Wall. 581, 591.
Erwin v. The United States, 37 Fed. 479.
Taylor v. The United States, 45 Fed. 531, 539.

Congress, in the Hepburn act, itself uses "causes" as including criminal causes. In paragraphs 11 and 12 of section 16 of the Interstate Commerce Act, as amended by section 5 of the Hepburn act, the word "causes" is so used. It should be given the same meaning in section 10.

The causes saved by section 10 are to be "prosecuted" in the manner provided by previous laws. "Prosecute" ordinarily denotes a criminal proceeding.

United States v. Reisinger, 128 U. S. 398, 403.
United States v. Ulrici, 3 Dill. 532.

Claims for damages are saved by the proviso at the end of par. 2 of amended section 16. The proviso is: "That claims accrued prior to the passage of this act may be presented within one year." Section 10 was therefore not necessary to this end.

As to the effect of repeals, the law is well settled.

(a) By the common law, in the absence of any saving statute the repeal of a criminal statute remits all penalties previously incurred for which final judgment of conviction had not been had at the date of the repeal.

United States v. Tynen, supra.
Norris v. Crocker, supra.
Ingersoll v. State, supra.
Mason v. Commonwealth, 36 S. W. 570.
Wharton v. State, 94 Am. Dec. 214.

(b) By section 13, Revised Statutes, in the absence of a special saving clause in the repealing act all penalties previously incurred under the act repealed are saved.

Lang v. United States, 133 Fed. 201.
People v. England, 91 Hun, 152.
State v. Smith, 62 Minn. 540.
Kleckner v. Turk, 63 N. W. 469.

(c) In the absence of a statute to the contrary where the repealing act saves rights accrued and penalties incurred under the previous law and at the same time modifies the procedure by which the right is to be enforced or the penalty recovered, the procedure in an action or prosecution to enforce

the right or recover the penalty must be in accordance with the later act.

Railroad Co. v. Oglesby, 76 N. E. 165, 166.
Taylor v. Strayer, 78 N. E. 236, 238.
Palmer v. City of Danville, 46 N. E. 629.
Holcombe v. Boynton, 37 N. E. 1031.

Congress is presumed to have known the law as to the effect of repeals.

State v. Showers, 34 Kans. 271.
Benton v. Willis, 88 S.W. 1000.

Congress, with knowledge of the principles which, in the absence of an enactment by it to the contrary, would apply to the repeal, adopted a different rule from either that prescribed by the common law or that prescribed by section 13. It saved only causes pending in the courts of the United States at the date of the repeal. As to these causes it saved, also, the procedure prescribed by previous laws. *Hence the use of the word "but," to indicate in each instance the antithesis between the rule enacted and the rule which would otherwise govern.*

The intent of Congress as to what should be saved from the repeal of the Elkins law must be collected from the words of section 10. Where language of the statute is clear there is no room for construction.

United States v. Wiltberger, 5 Wheat. 76, 95.
Wilkinson v. Leland, 2 Pet. 627, 662.

Pennington v. Coxe, 2 Cranch. 33, 52.
Lake County v. Rollins, 130 U. S. 662, 670.
Thornley v. United States, 113 U. S. 310, 313.
Doe v. Considine, 6 Wall. 458.

A statute must be so construed as to give effect to every word and clause of it.

Platt v. Railroad Co., 99 U. S. 48, 58
Market v. Hoffman, 101 U. S. 112, 115.
Crozier v. People, 69 N. E. 489, 491.
Perteet v. People, 65 Ill. 230.
Insurance Co. v. State, 89 S. W. 42, 44-45.
Railroad Co. v. Traction Co., 48 S. E. 746.
Association v. Sohn, 46 S. E. 222.
State v. Fontenot, 36 So. 630.

The construction contended for by petitioner, and no other, satisfies this rule.

Under the maxim *expressio unius est exclusio alterius* (a maxim of universal application in the construction of statutes; United States v. Aredondo, 6 Pet. 691, 725; State v. Showers, 34 Kans. 271), Congress has enacted by section 10 of the Hepburn act that the amendments and repeal accomplished by that act shall affect causes not pending at the date of the passage of the act.

For the purposes of section 10 Congress necessarily divided penalties, forfeitures and liabilities incurred under laws repealed by the Hepburn act into two classes, (1) those for which actions or prosecutions were pending, and (2) those for which actions or prosecutions had not been instituted at the date of the passage of the act. It expressly

saved the former. Under the maxim above stated it released and remitted the latter.

Clearly, the increased punishment provided by the Hepburn act cannot be imposed for offenses committed prior to its passage. Such construction would make it *ex post facto*, in violation of the Constitution of the United States.

Kring v. Missouri, 107 U. S. 221, 235.
Commonwealth v. McDonough, 13 Allen, 581.
State v. Ingersoll, 17 Wis. 651.
State v. Showers, 34 Kans. 271, 274.

As the penalties prescribed by the Hepburn act cannot be imposed for offenses committed prior to the passage of that act, and as the penalties prescribed by the Elkins law no longer continue in force as to causes not pending at the date of the passage of the Hepburn act, there is no law under which penalties can be imposed for the offenses charged in the indictment herein.

If the amended definition of the crime applies to prosecutions instituted after the passage of the Hepburn act, the indictment herein is bad for failure to allege that the departures from tariff were *knowingly* made.

The Circuit Court of Appeals, speaking upon this phase of the case, says:

> "It is at this point that a question lying within narrow compass, but of more difficulty, is encountered. The indictment, unlike that set forth in the opinion delivered in the district court, does not, in charging the granting and giving of concessions to the W. P. Devereaux Company, use the word 'know-

ingly,' or any other term of equivalent import, and so does not state a case falling within the contracted definition of the offense and without the repeal. True, upon the trial it was admitted, on behalf of the railway company, that these concessions were granted and given by its direction and with its consent, but as the sufficiency of the indictment was challenged by a demurrer and by a motion in arrest of judgemnt, and as the admission just stated was made under a stipulation that it should not prejudice the right of the railway company to question the sufficiency of the indictment, the correctness of the rulings upon the demurrer and the motion in arrest of judgment must be determined independently of what occurred upon the trial." (Printed opinion, p. 15.) Transcript p. 68.

The Hepburn act makes no substantial changes in respect to accrued civil causes or the procedure therein.

Amendments of sections 14, 15 and 16 of the original Interstate Commerce Act are made by the Hepburn act. The amendment of section 14 merely requires the Commission, in case it awards damages to a shipper, to include findings of fact on which such award is made. This amendment could not affect any cause pending in the courts of the United States, because it has reference only to future proceedings of the Commission, and these claims for damages cannot reach the courts until the Commission has passed upon them.

Railroad Co. v. Tift, 27 Sup. Ct. Rep. 709.

The amendment of section 15 confers upon the Interstate Commerce Commission a power which it never had until the Hepburn act became a law,

namely, the power to determine a reasonable rate which shall take effect at a stated time in place of a rate found to be unreasonable. This could not affect accrued causes.

Section 16, as amended, enacts a procedure by which an aggrieved carrier may review the order of the Commission fixing a rate for the future. This procedure cannot affect any cause pending at the date of the passage of the Hepburn act, because the Commission, prior to the passage of that act, could not make an order fixing a reasonable rate; hence there could not be any cause pending to review such an order.

Section 16 has also provided for bringing suits in the courts of the United States to enforce awards of damages made by the Commission on complaints of shippers. Original section 16 did not provide for the enforcement of these awards in the courts, except so far as this provision was included in that part of the original act which stated that whenever a carrier should violate or refuse to perform any order of the Commission founded upon a controversy requiring a trial by jury, any person interested might apply to the Circuit Court of the United States *in a summary way, by petition*, alleging the violation. Under the amended section 16 if the carrier does not pay the award of damages the person in whose favor it is made may apply to the Circuit Court of the United States, *by petition*, setting forth briefly the cause for which he claims damages and the order of the Commission thereon. The importance of this

change is not appreciated by your petitioner.

In addition, amended section 16 makes certain records of the Commission *prima facie* evidence in causes. This does not affect procedure. It affects the proof. It relates to proof in both civil and criminal causes. As applied to prosecutions for offenses committed prior to the passage of the Hepburn act it may be *ex post facto.*

Hopt v. Utah, infra.

The foregoing states the sum of the *changes* in procedure. These changes are far less radical than the changes made in the definition of the crime and the character of the punishment provided in the Elkins law. The changes in procedure could have no application to any pending cause, even had Congress not enacted that the pending causes should be prosecuted to a conclusion in the manner provided by the law in force prior to the passage of the Hepburn act, because no cause could have previously arisen to which the new procedure was applicable.

The claim that section 10 refers only to civil causes and particularly to procedure therein, is untenable, because (1) the word "causes" includes both civil and criminal causes; (2) radical changes are by the amendment made in the quality of the act which constitutes the crime, and in the punishment denounced against it; (3) no substantial changes are made in respect to pending civil causes, or the procedure therein.

Fairness and good faith demanded that penalties for previous offenses not in prosecution be remitted.

It is well settled that a statute will be so construed as to avoid injustice and unfairness on the part of the government.

Red Rock v. Henry, 106 U. S. 596, 604.

Broughton v. Pensacola, 93 U. S. 266, 269.

United States v. Railroad Co., 118 U. S. 235, 240.

Lau Ow Bew v. The United States, 144 U. S. 47, 59.

Section 20 of the Interstate Commerce Act, as amended by section 7 of the Hepburn act, has conferred upon the Interstate Commerce Commission extraordinary visitorial powers never before granted by the Federal Government to any board or person. The Commission may prescribe forms of accounts to be kept by carriers, and may at any time, by themselves or any of their agents, examine all of the carriers' books, vouchers and memoranda; discover every departure from tariff; ascertain the names of the officers who authorized it, and the name of the shipper in whose favor it was made. The books of a carrier are now open to the Interstate Commerce Commission to the same extent as to the carriers' own officers. The carrier is thus compelled to furnish the evidence of its own guilt, if any there be.

Under Article 5 of the Amendments to the Constitution of the United States, which provides that no person shall be compelled, in a criminal cause, to be a witness against himself, it has been neces-

sary, in all cases where Congress has required an individual to produce evidence of his own guilt, to also grant him immunity from prosecution on account of the acts disclosed by the evidence produced. It was thought by many that a corporation was a person within the meaning of this clause of the 5th amendment. In the early part of the year 1906 this Honorable Court, in the case of Hale v. Henckel, and in other cases (201 U. S. 43ff), held that a corporation was not a person within the meaning of this particular clause of the 5th amendment, and that it could not claim immunity because its books and papers were laid open to the scrutiny of prosecuting officials. The court discusses this question at page 74.

The Congress of the United States, as to the interstate business of carriers, has the same powers as have the state legislatures over all the affairs of corporations of the respective states.

Northern Securities Co. v. United States, 193 U. S. 197.

Under the Hepburn act the Interstate Commerce Commission might investigate matters occurring long prior to the passage of that act. The act would not on that ground be *ex post facto.*

Hopt v. Utah, 110 U. S. 574, 590.

Congress, at the date of the passage of the Hepburn act, knew that the law was settled as above stated. It recognized the 5th amendment as a declaration of governmental policy, and applied the

spirit to a situation not strictly within the letter of the amendment. In order to protect carriers from numerous prosecutions for offenses committed prior to the passage of the Hepburn act, upon evidence discovered by means of the visitorial power conferred, it remitted penalties for past offenses. There was no bad faith in saving pending prosecutions because the government had, from sources other than the carriers' books, discovered evidence of the violations involved in those prosecutions.

The clear meaning of section 10 is not to be defeated or thrown aside because of some supposed policy of one of the departments of the government in the matter of rebates

Railway Co. v. Phelps, 137 U. S. 528, 536.
Haddon v. Barney, 5 Wall. 107, 111.
United States v. Lee, 106 U. S. 196, 220.
Northern Securities Co. v. United States, 193 U. S. 197, 350.

It is peculiarly the province of the legislative department to determine the policy of the government with reference to the remission of penalties.

Northern Securities Co. v. United States, 193 U. S. 197, 351.
Goodno v. Oshkosh, 31 Wis. 127, 130.
Railway Co. v. Taylor, 52 Wis. 37, 58.

We contend that it clearly appears from section 10 of the Hepburn act that Congress intended to and did remit penalties incurred under the Elkins

law prior to June 29, 1906, for which prosecutions were not pending on that date.

C.

The legislative intent of the 59th Congress, as manifested in section 10 of the Hepburn act, cannot be defeated by section 13, Revised Statutes. Section 13 is:

> "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability."

The 41st Congress, in section 13, did not attempt, by the use of the words "so expressly provide," to fetter future Congresses. The word "expressly" means only "particularly," or "especially," or "with a distinct purpose or object." Section 13 requires only that the repealing act shall particularly speak to the subject of what shall be saved from the repeal.

Magone v. Heller, 150 U. S. 70.

Section 13 is no more than a legislative by-law. It is not a constitutional provision. It is subject to repeal the same as any other law. When a later Congress manifests, with reference to the subject matter of section 13, an intent contrary to

the provisions of that section, the manifest intent of the later Congress controls.

Manigault v. Springs, 199 U. S. 473, 487.
Brown v. Barry, 3 Dall. 365, 367.
Files v. Fuller, 44 Ark. 273, 280.
Cortelyou v. Anderson, 63 Alt. 1095, 1097.
Kleckner v. Turk, 63 N. W. 469-474, 475.

One Congress cannot limit a subsequent Congress to the use of any fixed formula to manifest its legislative intent.

Brightman v. Kirner, 22 Wis. 53.
Mongeon v. People, 55 N. Y. 613.
McCann v. City of New York, 52 App. Div. 358, 362.
People v. England, 91 Hun, 152, 155.
State v. Smith, 62 Minn. 540, 542.
Friend v. Levy, 80 N. E. 1036.
Files v. Fuller, 44 Ark. 273, 280.

Section 13 prescribes a general rule as to what shall be saved from any and all future repeals where the repealing statute is silent on the subject. Section 10 of the Hepburn act prescribes a particular rule as to what shall be saved from the particular repeal effected by that act. Section 10, therefore, speaks to the subject matter (or at least to a part of the subject matter) of section 13. It prescribes a special rule as to that to which it speaks. It therefore creates an exception to section 13, or effects a partial repeal of it. *Section* 13 *cannot save itself from repeal.*

State v. Showers, 34 Kans. 271.

Friend v. Levy, supra.
McCann v. New York, supra.
People v. England, supra.
Bank v. United States, 107 U. S. 445, 450.
Clark v. Baxter, 108 N. W. 838, 839.

To state the matter differently. The general saving statute, section 13, can have no application where Congress, in a repealing statute, enacts a special saving provision.

State v. Smith, supra.
People v. England, supra.
Files v. Fuller, supra.
State v. Showers, supra.

The question here discussed has never been decided by this Honorable Court. Section 13, Revised Statutes, is discussed in United States v. Reisinger, supra. The special saving clause involved in the Reisinger case did not speak to the subject matter of section 13.

Section 13 speaks to the saving of penalties, forfeitures and liabilities incurred *under the statute* repealed. It relates only to the saving of criminal fines and forfeitures (Wilson v. Head, 69 N. E. (Mass.) 317, 318), or in any event only to the saving of liabilities *under the statute*. The special saving clause involved in the Reisinger case spoke only to the saving of rights accrued *under contracts* previously made. It therefore could not create an exception to section 13, or in anywise affect its operation.

In the case of Lang v. The United States, 133 Fed. 204 (Circuit Court of Appeals for the Seventh Circuit), the question of the application of section 13 to repeals where the repealing statute spoke to the same subject matter, was discussed. The repealing statute in question enacted that the repeal should not affect causes "begun" under the repealed law. There were three separate opinions handed down. Judge Baker held that section 13 applied notwithstanding the special saving clause. Judge Jenkins held that section 13 could not apply because of the special saving clause, and that the special saving clause saved only actions pending at the date of the repeal. Judge Grosscup held that the special saving clause controlled, but that it had the same meaning as section 13. He reached this conclusion by construing the word "begun" to mean "now begun, or which shall hereafter be begun." A majority of the court, however, were of the opinion that section 13 could not apply where the repealing act itself spoke also as to what should be saved from the repeal.

The precise question here involved has, so far as we can discover, never been passed upon by any Federal court of appellate jurisdiction, except in the case at bar and in the Lang case.

D.

Section 13 is ineffectual to prevent the courts from giving effect by their decrees to the intent of a subsequent Congress, as that intent may be discovered from the subsequent enactment. The

judiciary is an independent department. To construe the law is of the essence of its duty.

Marbury v. Madison, 1 Cranch, 137, 176, 177.
Ableman v. Booth, 21 How. 506, 520.
Powell v. Pennsylvania, 127 U. S. 678, 686.
Gordon v. United States, 117 U. S. 697.
United States v. Klein, 13 Wall. 128, 147.
Dist. of Col. v. Hutton, 143 U. S. 18, 27.
United States v. Claflin, 97 U. S. 546.
Brown v. Barry, supra.
Files v. Fuller, supra.
Brightman v. Kirner, supra.
State v. Showers, supra.
Lang v. United States, supra.
People v. England, supra.
McCann v. New York.

In District of Columbia v. Hutton, this Court said:

> "The question is, was said section 354 repealed by the act of 1878? This is a judicial question, to be determined by the courts upon a proper construction of that section and subsequent legislation upon the same subject matter, and is not for the legislative branch of the government to determine."

E.

In conclusion, we submit that it is for the interest of all that the questions be speedily and finally determined. We have briefly outlined the points involved. Full discussion would be improper at this time. We respectfully ask this

Honorable Court to afford us an opportunity to present the matter more at length.

We beg to remind the Court that the mandate of the Circuit Court of Appeals has been stayed only until November 22, 1907.

WM. R. BEGG,
ROME G. BROWN,
CHAS. S. ALBERT,
Counsel for Petitioner.

Office Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1907.

No. 491.

GREAT NORTHERN RAILWAY COMPANY,
Petitioner,

vs.

THE UNITED STATES.

On Certiorari to the Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR PETITIONER.

Wm. R. BEGG.

Supreme Court of the United States.

OCTOBER TERM, 1907.

GREAT NORTHERN RAILWAY COMPANY,
Petitioner,

vs.

THE UNITED STATES.

STATEMENT OF THE CASE.

At the October, 1906, term of the United States District Court for the District of Minnesota, Fourth Division, the grand jury of the United States within and for said district and division, on the 8th day of November, 1906, came into open court and presented an indictment against petitioner and others.

By said indictment it was charged in fifteen separate counts that petitioner had at divers times from May 17, 1905, to August 3, 1905 (both dates inclusive), granted to a shipper, to-wit: W. P. Devereux Company, concessions from the rates specified in its published tariffs and schedules at the time filed and in force, for the transportation of fifteen separate shipments of property in interstate commerce, to-wit: from Minneapolis, in the

state of Minnesota, to Seattle and other places in the state of Washington, in violation of section 1 of an act entitled, "An act to further regulate commerce with foreign nations and among the states," approved February 19, 1903, commonly known as the Elkins Law. (Transcript, pp. 1-23.) It was not charged that the concessions were wilfully or knowingly granted.

The several counts of the indictment are alike except for necessary differences as to dates and the amounts of the concessions granted. The first count, after alleging the incorporation of petitioner; its occupation as a common carrier; the relationship of the other defendants named in the indictment to petitioner; the filing and publishing of the tariffs and schedules covering transportation of the character of that mentioned in the indictment and the shipment and transportation of the property described, proceeds:

> "but the grand jurors aforesaid, on their oath aforesaid, do present and charge that at the said city of Minneapolis, Minnesota, in the said Fourth Division of the District of Minnesota and within the jurisdiction of this court, on the said thirty-first day of July, 1905, the said Great Northern Railway Company, the said * * * officers and agents of the said Great Northern Railway Company as aforesaid, did unlawfully grant and give to the said W. P. Devereux Company, a corporation as aforesaid, a concession of twenty cents (20c) of the said freight rate, as aforesaid, upon every one hundred pounds (100 lbs.) of the property so transported by the said common carrier, as aforesaid, whereby the said property was by said corporation common carrier transported in said interstate commerce from the

said city of Minneapolis to the said city of Seattle, by the route and in the manner aforesaid, at a less compensation and rate than that named therefor in the said tariffs and schedules so as aforesaid published and filed by the said common carrier and in force at the time upon its said route, and which were then and there on file with the Interstate Commerce Commission of the United States, as required by law; that they, the said * * * agents and officers of the said Great Northern Railway Company, as aforesaid, were then and there, in all things, acting as aforesaid for and in behalf of the Great Northern Railway Company within the scope of their respective employments; which *is* against the peace and dignity of the United States, and contrary to the form of the statute in such case made and provided." (Trans., p. 3.)

On the 24th day of November 1906 petitioner and the other defendants named in said indictment were duly arraigned, and thereupon demurred to said indictment upon the grounds (1) that neither the said indictment nor any count thereof stated facts sufficient to constitute, as against the defendants therein named or either of them, an offense against the laws of the United States, or any offense, and (2) that the statute of the United States creating the offense or offenses pretended to be charged in said indictment, and under which said indictment was found, had been repealed and was not in force at the time when said indictment was found and returned. (Transcript, p. 25.)

Said demurrer was argued and submitted before the Honorable William Lochren and the Honorable Page Morris, Judges of the said District Court (Transcript, p. 26) and on the 26th day of January

1907, was overruled pursuant to an opinion and order filed by the Honorable Page Morris, one of said judges. (Transcript, pp. 27-46.) Judge Lochren did not concur in said order and the opinion filed therewith, stating that in his opinion the demurrer should be sustained. (Transcript, p. 29.) Petitioner was allowed an exception to the decree overruling said demurrer. (Transcript, p. 47.)

At the April 1907, term of said District Court, on the 6th day of April, 1907, said indictment was duly brought on for trial as to petitioner (it having been granted a trial separate and apart from the other defendants named therein) upon a plea of not guilty, before the Honorable Page Morris and a jury (Transcript, pp. 49, 50); and after the jury had been impanelled for the trial of said indictment, and after the prosecution had begun the production of its testimony, petitioner objected to the introduction of any evidence under said indictment on the same grounds as those upon which said demurrer was based; which objection was overruled by the court and an exception allowed petitioner. (Transcript, pp. 51, 52.) Thereupon petitioner admitted (without prejudice to its right to question, in subsequent proceedings, the sufficiency of the indictment) substantially all the facts alleged in the indictment, which admission was taken as the evidence on said trial, and both parties rested. (Transcript, pp. 52-54.)

Petitioner then moved the court to instruct the jury to return a verdict of not guilty upon the same grounds as those upon which said demurrer was

based, and upon the further ground that the facts shown by the evidence were not sufficient to constitute an offense; which motion was overruled and an exception allowed petitioner. (Transcript, p. 54.) The court then charged the jury and the jury returned a verdict of guilty. (Transcript, pp. 50, 54.)

After verdict and before sentence petitioner moved the court in arrest of judgment, basing said motion upon the same grounds as those stated in its motion for a directed verdict; which motion was denied and an exception duly allowed petitioner. (Transcript, pp. 55, 56.) Petitioner was thereupon, on the 9th day of April 1907, sentenced to pay a fine of fifteen thousand dollars, upon which sentence judgment of conviction was duly entered. (Transcript, pp. 50, 51.)

Upon the pleadings and a bill of exceptions duly settled petitioner, on said 9th day of April 1907, removed said cause by writ of error to the Circuit Court of Appeals for the Eighth Circuit. (Transcript, pp. 57-65.) On the 23rd day of September 1907, said Circuit Court of Appeals affirmed the sentence and judgment of the lower court. (Transcript, p. 89.) On November 19, 1907, a writ of certiorari to review said judgment was issued by this court.

Errors Relied On.

Of the errors assigned in the Circuit Court of Appeals those relied on in this court are:

1. The said District Court of the United States for the District of Minnesota, erred in overruling the demurrer of the defendant to the said indictment and to each count thereof, and in overruling said demurrer to each count of said indictment. (Transcript, p. 58.)

2. The said court erred in holding and deciding, upon the hearing upon said demurrer, that either the said indictment, or any count thereof, stated facts sufficient to constitute against the defendant an offense under the laws or the statutes of the United States, or any offense. (Transcript, p. 58.)

3. The said court erred in overruling defendant's objection, made at the beginning of the trial, to the introduction of any evidence, and in permitting testimony to be offered and taken as against said objection. (Transcript, p. 58.)

4. The said court erred in refusing the request of the defendant made before the argument to the jury and before the charge of the court to the jury, that the court charge the jury that, under the evidence in this case, and the law applicable thereto, it is the duty of the jury to return a verdict of Not Guilty as to each and every count of the indictment. (Transcript, p. 58.)

5. The court erred in charging the jury as follows:

> "If you believe the allegations contained in the indictment here in these several counts are proven by the evidence you should find the defendant guilty as charged in the indictment." (Transcript, p. 59.)

6. The court erred in denying defendant's motion to arrest judgment. (Transcript, p. 59.)

Questions Involved.

Petitioner's contention is:

(1) The indictment herein does not charge an offense under section 1 of the act entitled "An act to further regulate commerce with foreign nations and among the states," approved February 19, 1903, commonly known as the Elkins law, because it fails to allege that the concessions from tariff were either wilfully or knowingly granted.

(2) That part of section 1 of the Elkins law, which defined the crimes charged in the indictment and prescribed punishment therefor, had been before the indictment was returned, repealed by section 2 of an act entitled "An act to amend an act entitled 'An act to regulate commerce,' approved February 4, 1887, and all acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," approved June 29, 1906, commonly known as the Hepburn act.

(3) Congress, by section 10 of the Hepburn act, has manifested its intent that only penalties and

forfeitures incurred under the repealed parts of the Elkins law for which prosecutions were pending at the date of the passage of the Hepburn act should be saved, and that penalties and forfeitures for which prosecutions had not at that date been instituted should be remitted.

(4) Section 13 Revised Statutes, is ineffectual either (a) to prevent Congress from manifesting by such language and in such form as it chooses its intent to remit penalties and forfeitures previously incurred under the part of the Elkins law repealed by it, or (b) to prevent the courts from giving effect by their decrees to the intent manifested by Congress in section 10 of the Hepburn act.

The statutes bearing upon the questions presented are contained in the Appendix, pp. 121-145.

ARGUMENT.

I.

THE INDICTMENT DOES NOT CHARGE AN OFFENSE UNDER THE ELKINS LAW.

The indictment charges petitioner and the individual defendants jointly, with one and the same offense. The individual defendants could be guilty only of the offense defined in the third sentence of section 1.

The indictment charges only that petitioner and the other defendants *unlawfully* granted to W. P. Devereux Company concessions from tariff rates in violation of the third sentence of the section. Concessions from tariff granted under mistake are *unlawful.*

Railway Co. v. Mugg, 202 U. S. 242.

Railway Co. v. Hefley, 158 U. S. 98.

Railway Co. v. Harrison, 119 Ala. 539, 24 So. 552.

In **Railway Co. v. Harrison,** the supreme court of Alabama, discussing the decision in the Hefley case, said:

> "The clear effect of the decision was to declare that one who has obtained from a common carrier transportation of goods from one state to another at a rate specified in the bill of lading less than the published schedule rates filed with and approved by the Interstate Commerce Commission and in force at the time, whether or not he knew that the rate obtained was less than the schedule rate, is not entitled to recover the goods or damages for their de-

> tention upon the tender of payment of the amount of charges named in the bill of lading or of any sum not the schedule charge; in other words, that whatever may be the rate agreed upon the carrier's lien on the goods is by force of the act of Congress for the amount fixed by the published schedule of rates and charges, and this lien can be discharged and the consignee can become entitled to the goods only by the payment or tender of payment of such amount. Such is now the supreme law and by it this and the courts of all other states are bound."

In **Railway Co. v. Mugg**, this language was quoted with approval.

The last half of the second sentence of this section makes any concession, however made, unlawful. Criminal intent must be necessary to convert this unlawful act into a crime. The concession, to be a crime, must be either *knowingly* or *wilfully* granted. If a criminal intent is necessary to the crime, it must be charged in the indictment.

> United States v. Carll, 105 U. S. 611, 612.
>
> Evans v. United States, 153 U. S. 584, 587.
>
> Armour Packing Co. v. United States, 153 Fed. 1, 23, 24.

In **United States v. Carll**, the court said:

> "In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light of the common law and of other statutes on the like matter, enables the court to infer the intent of

> the legislature does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent. U. S. v. Crinkshauk, 92 U. S. 542; U. S. v. Simmons, 96 U. S. 360; Com. v. Clifford, 8 Cush. 215; Com. v. Bean, 11 Cush. 414; Com. v. Bean, 14 Gray 52; Com. v. Filburn, 119 Mass. 297."

In **Armour Packing Co. v. United States**, the court said:

> "No question of liability on account of a concession given or received under a mistake of fact or in ignorance of the established rate is presented in this case. * * * Counsel for the shipper have insisted, and the district attorney has denied, that any criminal intent was essential to the conviction of the statutory offense here charged. It has not been necessary to consider or decide, and the court has not considered and does not decide that question, because there was ample evidence that the shipper was guilty of the only criminal intent that could be requisite to such conviction. The case has been determined on the assumption and concession, but not upon a decision that such an intent was indispensable."

The language here used refers to the proof and not to the allegations of the indictment.

It is only by virtue of the Elkins law that the corporation may be guilty of the crime. It has not been and cannot be claimed that the indictment charges an offense under any law other than the third sentence of section 1 of the Elkins law.

Commission v. Railway Co., 145 U. S. 263, 281.

United States v. Hanley, 71 Fed. 672, 674, 676.

II.

THAT PART OF SECTION 1 OF THE ELKINS LAW WHICH DEFINED THE CRIME ATTEMPTED TO BE CHARGED IN THE INDICTMENT AND PRESCRIBED PUNISHMENT THEREFOR, HAD BEEN, BEFORE THE INDICTMENT WAS RETURNED, REPEALED BY SECTION 2 OF THE HEPBURN ACT.

The indictment herein charges certain acts to have been done and completed in the months of May, June, July and August 1905. The Hepburn act was approved and became a law June 29, 1906. The indictment was found and returned November 8, 1906.

That part of section 1 of the Elkins law which defined the crimes attempted to be charged and prescribed the punishment therefor is:

> "Every person or corporation who shall offer, grant or give, or solicit, accept or receive any such rebate, concession or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars. In all convictions occurring after the passage of this act for offenses under said act to regulate commerce, whether committed before or after the passage of this act or for offenses under this section, no penalty shall be imposed on the convicted party other than the fine prescribed by law, imprisonment wherever now prescribed as a part of the penalty being hereby abolished."

By section 2 of the Hepburn act, that part of section 1 of the Elkins law above quoted is amended to read:

"Every person or corporation, *whether carrier or shipper* who shall *knowingly* offer, grant, or give, or solicit, accept or receive any such rebate, concession or discrimination, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars. *Provided, that any person or any officer or director of any corporation subject to the provisions of this act or the act to regulate commerce, and the acts amendatory thereof, or any receiver, trustee, lessee, agent or person acting for or employed by such corporation who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.*"

The changes made by the Hepburn act are *italicized.*

The remaining provisions of the Elkins law are substantially re-enacted. By an added paragraph additional penalties are provided for receivers of rebates.

Section 10 of the Hepburn act repealed inconsistent laws.

A.

THE PART OF THE HEPBURN ACT ABOVE QUOTED REPEALED THE PART OF THE ELKINS LAW ABOVE QUOTED, BECAUSE THE HEPBURN ACT CHANGED THE CHARACTER OF THE CRIME AND THE NATURE OF THE PUNISHMENT.

The intent, knowledge or purpose which must exist in the mind of the actor to make his act criminal may be called the subjecive element of the

crime. The classes of things and persons upon or against whom or by means of which the act, to be criminal, must be committed, are among what may be called the objective elements. The punishment denounced is the sanction provided by the law.

The prosecution claims that under the Elkins law it was not necessary that to be a crime the concession from tariff be knowingly granted, and the indictment here involved does not charge a concession knowingly granted. Under the amendment made by the Hepburn act the departure, to be criminal, must be knowingly made, and the indictment must so allege. The element of *scienter* is injected.

The punishment is changed. Under the Elkins law the only punishment prescribed was a fine. Under the amendment the punishment is a fine and *also imprisonment* for not to exceed two years, of other than corporate offenders.

Such radical changes in the ingredients of the crime and in the punishment therefor necessarily under the decisions of this and other courts, work the repeal of the part of the Elkins law above quoted.

Norris v. Crocker, 13 How. 429, 439.
United States v. Tynen, 78 U. S. 88, 92.
United States v. Claflin, 97 U. S. 546, 550, 552.
United States v. Fisher, 109 U. S. 143, 145.
Bank v. United States, 107 U. S. 445.
District of Col. v. Hutton, 143 U. S. 18, 26.
People v. Tisdale, 57 Cal. 104, 106.
Telegraph Co. v. Brown, 8 N. E. 171, 172.
Lindsey v. State, 5 So. 99, 100.

State v. Allen, 44 Pac. 121, 122.

State v. Ingersoll, 17 Wis. 651, 655.

Mullen v. People, 31 Ill. 444, 445.

Mongeon v. People, 55 N. Y. 613, 615.

State v. Massey (N. C.), 4 L. R. A. 308, 311.

Wharton v. State, 5 Coldw. 1; 94 Am. Dec. 214.

State v. Smith, 62 Minn. 540.

Lewis' Sutherland Stat. Constr., Vol. II, p. 482.

In Norris v. Crocker, the question was whether section 4 of the act of February 12, 1793 (1 Stat. at L. 305) relating to fugitive slaves, was repealed by section 7 of the act of September 18, 1850 (9 St. at L. 464) relating to the same subject. Section 4 of the act of February 12, 1793, was:

> "Any person who shall knowingly and willingly obstruct or hinder such claimant, his agent or attorney in so seizing or arresting such fugitive from labour, or shall rescue such fugitive from such claimant, his agent or attorney when so arrested pursuant to the authority herein given or declared; or shall harbor or conceal such person after notice that he or she was a fugitive from labour, as aforesaid, shall, for either of the said offenses, forfeit and pay the sum of five hundred dollars. Which penalty may be recovered by and for the benefit of such claimant, by action of debt, in any court proper to try the same; saving moreover to the person claiming such labor or service, his right of action for or on account of the said injuries or either of them."

Section 7 of the act of September 18, 1850, was:

> "Any person who shall knowingly and willingly obstruct, hinder or prevent such claimant, his agent or attorney, or any person or persons lawfully assisting him, her or them, from arresting such fugitive from service or labor, either with or without process as afore-

said, or shall rescue, or attempt to rescue, such fugitive from service or labor, from the custody of such claimant, his or her agent or attorney, or other person or persons lawfully assisting as aforesaid, when so arrested, pursuant to the authority herein given and declared; or shall aid, abet or assist such person so owing service or labor as aforesaid, directly or indirectly, to escape from such claimant, his agent or attorney, or other person, or persons legally authorized as aforesaid; or shall harbor or conceal such fugitive, so as to prevent the discovery and arrest of such person, after notice or knowledge of the fact that such person was a fugitive from service or labor as aforesaid, shall, for either of said offenses, be subject to a fine not exceeding one thousand dollars, and imprisonment not exceeding six months, by indictment and conviction before the district court of the United States for the district in which such offense may have been committed, or before the proper court of criminal jurisdiction, if committed within any one of the organized territories of the United States; and shall moreover forfeit and pay, by way of civil damages to the party injured by such illegal conduct, the sum of one thousand dollars, for each fugitive so lost as aforesaid, to be recovered by action of debt, in any of the district or territorial courts aforesaid, within whose jurisdiction the said offense may have been committed."

The court said:

"And the question is, whether the foregoing provisions of the act of 1850 are repugnant to those contained in the act of 1793, so far as the penalty of five hundred dollars is concerned.

The former statute gives this penalty to the owner in three cases: for obstructing an arrest; for a rescue; and for harboring the fugitive. It was given, regardless of the fact, whether the owner had or had not recovered his slave; and in addition, by the act of 1793, he might sue for and recover the value, if the slave was

lost by the illegal conduct of the defendant; or he might recover inferior damages if the slave was obtained.

By the act of 1850, a penalty is inflicted by way of fine, on conviction; and imprisonment is added. The prosecution is at the instance of the United States, with which the owner of the slave is not necessarily connected, the government taking the penalty recovered; nor is it of any consequence under this mode of proceeding, whether the owner has or has not recovered his slave; the offender being equally liable to prosecution for committing any one of the offenses enumerated in the statute, including the old ones, found in the act of 1793; and the additional ones superadded in that of 1850, and which are indicated by the words in italics. The recent statute covers every offense found in the former act, which subjects the offender to a penalty of $500 and prescribes a new and different penalty, recoverable by indictment; and is plainly repugnant to the act of 1793."

In **United States v. Tynen**, the question was whether section 13 of the act of March 3, 1813 (2 Stat. at L. 811) for the regulation of seamen, was repealed by section 2 of the act of July 14, 1870 (16 Stat. at L. 254) to amend the naturalization laws. Section 13 of the act of March 3, 1813, was:

"If any person shall falsely make, forge or counterfeit or cause or procure to be falsely made, forged or counterfeited, any certificate or evidence of citizenship referred to in this act; or shall pass, utter, or use as true, any false, forged or counterfeited certificate of citizenship, or shall make sale or dispose of any certificate of citizenship to any person other than the person for whom it was originally issued and to whom it may of right belong, every such person shall be deemed and ad-

judged guilty of felony; and on being convicted thereof by due course of law, shall be sentenced to be imprisoned and kept to hard labour for a period not less than three, or more than five years, or be fined in a sum not less than five hundred dollars, nor more than one thousand dollars, at the discretion of the court taking cognizance thereof."

Section 2 of the act of July 14, 1870, was:

"If any person applying to be admitted a citizen, or appearing as a witness for any such person, shall knowingly personate any other person than himself, or falsely appear in the name of a deceased person, or in an assumed or fictitious name, or if any person shall falsely make, forge or counterfeit any oath, affirmation, notice, affidavit, certificate, order, record, signature or other instrument, paper or proceeding required or authorized by any law or act relating to or providing for the naturalization of aliens; or shall utter, sell, dispose of or use as true or genuine, or for any unlawful purpose, any false, ante-dated or counterfeit oath, affirmation, notice, certificate, order, record, signature, instrument, paper or proceeding as aforesaid; or sell or dispose of to any person other than the person for whom it was originally issued, any certificate of citizenship, or certificate showing any person to be admitted a citizen; or if any person shall in any manner use for the purpose of registering as a voter, or as evidence of a right to vote, or otherwise, unlawfully, any order, certificate of citizenship, or certificate, judgment or exemplification showing such person to be admitted to be a citizen, whether heretofore or hereafter issued or made, knowing that such order or certificate, judgment, or exemplification has been issued or made; or if any person shall unlawfully use, or attempt to use any such order or certificate, issued to or in the name of any other person, or in a fictitious name, or the name of a deceased person; or use, or attempt to use, or

aid, or assist or participate in the use of any certificate of citizenship knowing the same to be forged, or counterfeit or ante-dated, or knowing the same to have been procured by fraud, or otherwise unlawfully obtained; or if any person, and without lawful excuse, shall knowingly have or be possessed of any false, forged, ante-dated or counterfeit certificate of citizenship, purporting to have been issued under the provisions of any law of the United States relating to naturalization, knowing such certificate to be false, forged, ante-dated or counterfeit, with intent unlawfully to use the same; or if any person shall obtain, accept or receive any certificate of citizenship known to such person to have been procured by fraud or by the use of any false name, or by means of any false statement made with intent to procure or to aid in procuring, the issue of such certificate, or known to such person to be fraudulently altered or ante-dated; or if any person who has been or may be admitted to be a citizen shall, on oath or affirmation, or by affidavit, knowingly deny that he has been so admitted, with intent to evade or avoid any duty or liability imposed or required by law, every person so offending shall be deemed and adjudged guilty of felony, and, on conviction thereof, shall be sentenced to be imprisoned and kept at hard labour for a period not less than one year nor more than five years, or be fined in a sum not less than three hundred dollars nor more than one thousand dollars, or both such punishments may be imposed, in the discretion of the court. And every person who shall knowingly and intentionally aid or abet any person in the commission of any such felony, or attempt to do any act hereby made felony, or counsel, advise, or procure or attempt to procure, the commission thereof, shall be liable to indictment and punishment in the same manner and to the same extent as the principal party guilty of such felony, and such person may be tried and convicted thereof without the previous conviction of such principal."

The court said:

> "Now between the provisions of the act of 1813 and the act of 1870 there is a clear repugnancy. The first act makes the punishment for the offenses designated imprisonment or fine. It provides that the punishment shall be one or the other, and in so doing declares that it shall not be both. The second act allows both punishments in the discretion of the court; it thus permits what the first law prohibits.
>
> Again, the act of 1813 provides that the imprisonment, when imposed as a punishment, shall not be less than three years, and may be extended to five. The act of 1870 allows the imprisonment to be fixed at one year, and from that period upwards to five years. In this also it permits what the first act forbids.
>
> Again, the act of 1813 declares that the fine, when imposed, shall not be less than five hundred dollars. The act of 1870 allows the fine to be as low as three hundred dollars, thus authorizing what the first act declares shall not be done.
>
> When repugnant provisions like these exist between two acts, the latter act is held, according to all authorities to operate as a repeal of the first act, for the latter act expresses the will of the government as to the manner in which the offenses shall be subsequently treated."

In United States v. Claflin, the question was whether section 2 of the act of March 3, 1823 (3 Stat. at L. p. 781) was repealed by section 4 of the act of July 18, 1866 (14 Stat. at L. p. 179). Section 2 of the act of March 23, 1823, was:

> "If any person or persons shall receive, conceal, or buy, any goods, wares or merchandise, *knowing* them to have been illegally imported into the United States, and liable to seizure by virtue of any act in relation to the revenues,

such person or persons shall, on conviction thereof, forfeit and pay a sum double the amount or value of the goods, wares, or merchandise, so received, concealed or purchased."

Section 4 of the act of July 18, 1866, was:

"If any person shall *fraudulently* or *knowingly import* or bring into the United States, or assist in so doing, any goods, wares or merchandise, contrary to law, or shall receive, conceal, buy, *sell or in any manner facilitate the transportation, concealment or sale of such goods*, wares, or merchandise, after their importation, *knowing* the same to have been imported contrary to law, such goods, wares, and merchandise shall be forfeited, and he or she shall, on conviction thereof before any court of competent jurisdiction, be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both, at the discretion of such court; and in all cases where the possession of such goods shall be shown to be in the defendant, or where the defendant shall be shown to have had possession thereof, such possession shall be deemed evidence sufficient to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury."

The court said:

"When it (the act of 1866) was enacted, Congress had in view as well the offense described in the act of 1823 as other offenses against the revenue laws. It mentions in *ipsissimis verbis* the offense created by that act. Its provisions are also broader in their scope. It includes offenses by importers. It adds to the offenses described in the act of 1823, selling the illegally imported goods, and facilitating in any manner their transportation, concealment, or sale after their importation, knowing them to have been imported contrary to law; and for each of these offenses, as well as for

those described in the act of 1823, it imposes a forfeiture of the goods, and prescribes a fine on conviction not exceeding $5,000 nor less than $50 or imprisonment, or both, at the discretion of the court.

What, then, was its effect upon the prior statute? The principles of legal construction to be applied to such a case are well known. While repeals by implication are not favored, and while it is held that a statute is not repealed by a later one containing no repealing clause, unless the later statute is positively repugnant to the former, or is a plain substitute for it, supplying its provisions, it is still true that repeal or no repeal, substitution or no substitution, is a question of legislative intention, and there are acknowledged rules for ascertaining that intention. * * *

It is, however, necessary to the implication of a repeal that the objects of the two statutes are the same, in the absence of any repealing clause. If they are not, both statutes will stand though they may refer to the same subject. (Maxwell on the Interpretation of Statutes, 153.) This consideration had weight with us when Stockwell v. The United States was decided. We then regarded the act of 1823 not so much punitive as remedial. This seemed to us to be evinced by the fact that the amount recoverable under that act by the United States was made proportional to the value of the goods wrongfully concealed or bought, and not in the least proportional to the degree of criminality of the act of receipt, purchase or concealment. Hence, we regarded the claim for double the value of the goods concealed, received or bought as only a claim for indemnity for abstracting goods forfeited for illegal importation. And we thought the object of the act of 1866 was only to punish the offense criminally. If this were truly the purpose of the acts, their objects would not have been the same, and therefore, the second statute could not be regarded as repealing the former. But a re-

> newed and more careful examination of the two statutes, aided as it has been by the argument of counsel, has convinced us that Congress, in the act of 1866, had in view not only punishment of the offense described, but indemnity to the government for loss sustained in consequence of the criminal conduct of those guilty of the offense. The later act denounces a forfeiture of the goods concealed, etc., no matter in whose hands they may be found. If the forfeiture of double the value of the goods denounced by the act of 1823 was designed to secure indemnity to the government for the wrong done, the forfeiture of the goods themselves, declared in the act of 1866, must have been intended for the same purpose, and the fine and imprisonment were superadded as a vindication of the public justice. If this is so, as we now think it is, the act of 1866 supplied the provisions of the second section of the act of 1823, and, consequently, would have repealed them had it contained no repealing clause."

In **United States v. Fisher**, the court, discussing whether an appropriation act appropriating $2,600 as judge's salary repealed a prior act fixing the salary at $3,000, said:

> "Certain well-settled rules of interpretation are applicable to this case. One is that a legislative act is to be interpreted according to the intention of the legislation apparent upon its face. Wilkinson v. Leland, 2 Pet. 627; another, that, if possible, effect must be given to every clause, section and word of the statute, Bacon's Abr. Statute 1, 2; Powlter's Case, 11 Coke, 29a; 34a; Potter's Dwarris, 194; Opinion of the Justices, 22 Pick. 571; and a third, that where two acts are in irreconcilable conflict the later repeals the earlier act, even though there be no express repeal. McCool v. Smith, 1 Black. 459; United States v. Tynen, 11 Wall. 88; Red Rock v. Henry, 106 U. S. 596; United States v. Inim, 5 McLean, 178; West v. Pine, 4 Wash. 691; Britton v. Commonwealth, 1 Cush. 302."

In **District of Columbia v. Hutton**, it appeared that section 354 of the Revised Statutes of the District of Columbia prescribed certain qualifications for persons eligible for appointment on the police force. This section 354 was an embodiment of certain provisions of the acts of 1861 and 1867. In 1878 the board of metropolitan police was abolished and "all the powers and duties now exercised by them shall be transferred to the said commissioners of the District of Columbia, who shall have authority to employ such officers and agents and to adopt such provisions as may be necessary to carry into execution the powers and duties devolved upon them by this act."

The court said:

> "We are not unmindful of the rule that repeals by implication are not favored. But there is another rule of construction equally sound and well settled which we think applies to this case. Stated in the language of this court in United States v. Tynen, 11 Wall. 88, 92, it is this: 'When there are two acts on the same subject the rule is to give effect to both if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first, and even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act.' See also Murdock v. Memphis, 20 Wall. 590, 617; Tracy v. Tuffly, 134 U. S. 206, 223; Fisk v. Henarie, 142 U. S. 459."

In **Telegraph Co. v. Brown**, there had been in force a statute making telegraph companies liable to a

penalty to be recovered by the person whose dispatch is neglected or postponed. On April 8, 1885, a law was passed changing the offense in many particulars, both acts being set out in full in the opinion of the court. The court, page 172, said:

> "In our judgment, this later act operated as a repeal of the above section 4176. The title is comprehensive, and clearly indicates an intention on the part of the legislature to revise the whole subject of penalties against telegraph companies for a failure to transmit messages promptly, and with impartiality. The act also covers the whole subject matter; is different and more comprehensive in its terms than section 4176; contains provisions not found in that section, and that are not reconcilable therewith. When such is the case, the later act repeals the former upon the same subject. * * *
>
> Section 4176 required that messages should be transmitted promptly and with impartiality, whether received from other telegraph companies or from individuals, but the penalty was only for a failure to transmit the message or the postponing it out of its order. It also provided that the penalty might be recovered by the person whose dispatch was neglected or postponed. The act of 1885 provides that messages shall be transmitted promptly and with impartiality, whether received from other telegraphic lines or other companies, or from individuals, and that the company 'shall in no manner discriminate in rates charged or words or figures charged for, or manner or condition of service between any of its patrons.' It further provides that any person or company violating any of the provisions of the act shall be liable to any party aggrieved in a penalty of $100 for each offense, etc. * * *
>
> In the act of 1852 (Section 4176, supra), the penalty, as we have seen, is alone for the failure or delay in transmission of the message. In the act of 1885 the penalty may be recovered also

> for any forbidden discrimination. The act of 1852 (Section 4176, supra) as interpreted by this court, gave a right of action for the penalty to the sender of the dispatch only."

In **Lindsey v. State**, there had been in force a statute imposing a fine for carrying concealed weapons, except where the person apprehended an attack, when he was permitted to carry concealed weapons. On March 9, 1888, the act was amended by striking out the exception and changing the amount of the penalty. The court said:

> "The purpose and effect of the amendment to section 2985 of the Code was to repeal as much of the section as fixed the punishment for carrying concealed weapons, and permitted having a good and sufficient reason to apprehend an attack to be a defense to the charge, and to prescribe a new and severer punishment for the offense. The punishment prescribed by the amendment was substituted for and took the place of that provided by the section before it was amended. The section as amended made it unlawful for one to carry concealed weapons, though he might have good and sufficient reason to apprehend an attack, and it increased both the minimum of fine and imprisonment provided by the section before its amendment, and prescribed the only penalty for the offense. In this state of the law, how can appellant be lawfully punished for the offense with which he is charged? It is better that any criminal shall go unpunished than that any provision of the constitution shall be disregarded, or the foundations of the criminal law shall be unsettled. After the amendment to section 2985 of the Code was adopted, appellant could not be punished under the section as it existed before the amendment, because so much of it as related to the penalty had been repealed; and he could not be punished under the section as amended, because it operated

> prospectively from the date of the approval of the amendment, and, there being no saving clause as to offenses committed before the passage of the amendment, it could not be applied to him."

In **State v. Allen**, the code made illegal the sale and use of oleomargarine. The act of March 11, 1895, covering the same subject matter provided that "all acts and parts of acts in conflict with this act are hereby repealed." The court held that the act of 1895 related to the same subject matter and that the same general object was sought to be accomplished by its enactment, and that the later act repealed the former. The court said:

> "It is familiar law that the repeal of a statute pending a prosecution thereunder, without any saving clause as to such prosecution, will prevent its being further prosecuted; and this rule applies as well after judgment and sentence pending an appeal duly taken therefrom as before the final determination in the trial court. A question is therefore presented, preliminary to an investigation of the errors alleged to have been committed during the progress of the cause in the trial court, and that is as to the effect of the act of 1895 upon the section of the act of 1891, under which the appellant was prosecuted. If section 5 of the act of 1895 attempted to legislate upon substantially the same subject as did the section under which the prosecution was instituted, such last-named section was repealed by the act of 1895, it being a part of an act in conflict with the provisions of the act of 1891. A careful reading of the two sections convinces us that they related to the same subject matter, and that the same general object was sought to be accomplished by the legislature in the enactment of each of the sections. It follows that the one contained in the act of 1891 was repealed by the act of

1895, and that, for that reason, the judgment and sentence must be reversed, and the defendant discharged."

In **State v. Ingersoll**, there had been in force a law against the sale of intoxicating liquors without license and making such sale a misdemeanor, punishable by a fine of not less than $10 nor more than $40 and costs of the suit, or by imprisonment in the county jail for a period of 60 days, unless the offender should be discharged by the payment of the fine and costs. In 1862 the law was amended so as to read just as did the old law down to the words "costs of suit," and then providing that the offender might, in lieu of such fine, be punished by imprisonment in the county jail not to exceed 60 days and not less than 20 days, and that in case of punishment by fine such person should, unless the fine and costs be paid forthwith, be committed to the county jail until fine and costs were paid, or until discharged by due course of law, and that in case of a second or subsequent conviction of the same person during any one year the punishment might be both fine and imprisonment, in the discretion of the court. The court said:

> "The attorney general contends that the act of 1862 was not intended to apply to any offense already committed. However that may be, still, if the effect of the act was, as we have supposed, to supersede and repeal the former law, then it is manifest that there was no law which authorized the court to give judgment. So far as the act complained of here is concerned, it was as though the legislature had directly repealed section 5, Chapter 35 and stopped there. In that case it is apparent no prosecu-

tion could be maintained and no conviction had. This is a very familiar principle. The same result must now follow when the legislature repeals that section in the manner it did. Of course it will not be contended that it was incompetent for the legislature to repeal that provision of law. The only question is, has it done so? If it has, there must be an end to this prosecution, inasmuch as there was no saving clause in the repealing statute, and the latter statute not applying to this offense. That the statute of 1862 could not apply to this offense, was conceded on the argument, since it makes the act of selling liquor without a license punishable in a manner different from what it was when committed. It imposes a severer penalty than was provided by the law in force in 1861, and would therefore be obnoxious to the objection of being ex post facto law, if intended to apply to any offense committed before its passage."

In **Mullen v. People**, there had been in existence prior to 1859 a statute providing that upon conviction of manslaughter the accused should be punished by imprisonment not exceeding eight years. In 1859 the statute was amended by providing that the person convicted of manslaughter should be punished upon conviction by confinement in the penitentiary for such number of years as the jury should in their verdict fix. The court said:

"This act contains no express repealing clause. But the latter act is comprehensive, and embraces all that is embraced by the 29th section of the criminal code. The provisions of the act of 1859 are repugnant to the provisions of the former act, inasmuch as it requires the term to be for life, or a number of years, while the former act authorized it to be fixed for any period not exceeding eight years. Under the original act, a jury had the right to

fix the time at less than one year, but under the act of 1859, it at least must be for one year. In so far as the acts are repugnant, the last expression of the will of the general assembly must prevail."

In **Mongeon v. People**, the court said:

"The act of 1869 (Laws of 1869, Chap. 631) declares that any person committing the offense of which the plaintiff in error was charged shall, upon conviction, be deemed guilty of manslaughter in the second degree; and the statutory punishment for that offense is imprisonment in a state prison not less than four and not more than seven years (2 R. S. 662, sec. 29). The act of 1872 (Laws of 1872, Chap. 181) declares that any person that shall thereafter commit the same offense shall, upon conviction, be deemed guilty of a felony, and punished by imprisonment in a state prison for a term not less than four years or more than twenty years, and repeals all acts and parts of acts inconsistent with it. The act of 1869 is not repealed in terms or by express reference, and it is not repealed by implication, unless the two statutes, are manifestly repugnant and inconsistent, or the later statute covers the whole subject matter and was intended as a substitute for the former. The law of 1869 ceased to be operative upon offenses committed after the 6th of April 1872, the time at which the later act became a law. The two acts making different and incompatible provisions in respect to the same subject, they could not both stand, and the earlier act was abrogated as to all future offenses."

In **State v. Massey**, there had been in existence a law, which provided that whoever shall unlawfully and maliciously set fire to any church, mill, barn, etc., whether the same shall be in the possession of the offender, or of any other person shall be guilty

of a felony and be imprisoned in the penitentiary for not less than five years nor more than forty years. On the 16th of February, 1885, the legislature amended the law by striking out the words "unlawfully" and "maliciously" where they appear in said section, and inserting in lieu thereof, the words "wantonly" and "wilfully," and by striking out the words "with intent thereby to injure or destroy any person or persons, etc." The court said:

> "When a statute creating a criminal offense is expressly repealed, or any portion of it that is essential to sustain an indictment, drawn under its provisions, is stricken out by a law subsequently enacted, the former will be held inoperative even as to offenses committed before the passage of the later act, unless a contrary intent on the part of the law-makers appears from an express saving clause, or by necessary implication from the language in the repealing statute. Lindsey v. State (Miss.), 5 So. Rep. 99; State v. Long, 78 N. C. 571; State v. Wise, 66 N. C. 120." * * *
>
> We think that the law under which the indictment was drawn did not continue in force in its original form up to the passage of the amendatory act, and we therefore concur with the judge below in his ruling.
>
> It is not the province of this court to pass upon the innocence or guilt of the accused. If he was not guilty, still he had the right, and it was the duty of his counsel, to have the case disposed of in this summary way.
>
> If he was guilty under section 985, subsection 6 of the code, we must presume that the legislature, in omitting to add a saving clause to the act of 1885, intended to discharge all who had been previously guilty of violations of the section amended."

In **Wharton v. State**, the defendant was charged with having committed, while a slave, a crime which

when committed by a slave was punishable by death. Before the defendant was convicted, slavery was abolished and a law enacted that persons who had previously been slaves should not be subject to any other or different punishments than such as were prescribed for white persons committing like offenses. The crime charged, if committed by a free white person, was punishable only by imprisonment. The court said:

> "The second section of the act of 1866, chapter 40, by necessary implication, takes away the death penalty annexed to the crime of rape, when committed by a colored man upon a white woman, after its passage, and substitutes, as in cases of white men, imprisonment in the penitentiary. Now, it cannot be said, we apprehend, that this act is not inconsistent with the provisions of the code, section 2625; and if so, the fourth section of the act of 1866 expressly repeals it.
>
> In the case before cited, of Roberts v. State, which was approved in the case of Bennett v. State, this court said: 'To effect a repeal, it is not necessary that the latter statute should have an express repealing clause. If it be a legislation upon the same subject, and contain different and inconsistent provisions, it operates as a repeal.'
>
> The court further say that 'it is a doctrine, to the correctness of which we know of no exception in any of the reported cases, that in all cases where a statute creates a different punishment, the former mode is thereby repealed; and the rule operates whether the punishment thus altered is diminished or increased.' Citing 6 Bac. Abr. Am. 372; Turner's Case, 1 Leach. 306; Buggin v. Bennett, 4 Burr. 2036."

In Lewis' Sutherland Stat. Constr., the rule is stated:

"But if the same offense, identified by name or otherwise, is altered in degree or incident, or if a felony is changed to a misdemeanor or *vice versa*, the statute making such change has the effect to repeal the former statute."

B.

THE RULE THAT THE REPEAL AND SIMULTANEOUS RE-ENACTMENT, LITERALLY OR SUBSTANTIALLY, OF A STATUTE, CONTINUES IT, HAS NO APPLICATION TO THE CASE AT BAR.

(1) *This court, as well as others, has rejected the rule where the re-enactment is a complete revision of and substitute for the earlier statute.*

Murdock v. Memphis, 20 Wall. 590, 616.

Pana v. Bowler, 107 U. S. 529, 538.

Murphy v. Utter, 186 U. S. 95, 104-105.

Tracy v. Tuffly, 134 U. S. 206, 223.

Bank v. United States, 107 U. S. 445.

Red Rock v. Henry, 106 U. S. 596.

The Paquete Habana, 175 U. S. 677, 685.

State v. King, 12 La. Ann. 593, 594.

Coffin v. Rich, 45 Me. 507, 512-513.

Goodno v. Oshkosh, 31 Wis. 127, 129.

Wilson v. Railway Co., 29 Pac. 869.

In Murdock v. City of Memphis, the court said:

"The act of 1867 has no repealing clause nor any express words of repeal. If there is any repeal, therefore, it is one of implication. The differences between the two sections are of two classes, namely, the change or substitution of a few words or phrases in the latter for those used in the former, with very slight, if any, change of meaning, and the omission in the latter of two important provisions found in the former. It will be perceived by this statement

that there is no repeal by positive new enactments inconsistent in terms with the old law. It is the words that are wholly omitted in the new statute which constitute the important feature in the questions thus propounded for discussion.

A careful comparison of these two sections (set forth in parallel columns, supra, pp. 592, 593 Rep.) can leave no doubt that it was the intention of Congress, by the latter statute, to revise the entire matter to which they both had reference, to make such changes in the law as it stood as they thought best, and to substitute their will in that regard entirely for the old law upon the subject. We are of opinion that it was their intention to make a new law so far as the present law differed from the former, and that the new law embracing all that was intended to be preserved of the old, omitting what was not so intended, became complete in itself and repealed all other law on the subject embraced within it. The authorities on this subject are clear and uniform."

In **Pana v. Bowler**, the court said:

"The amendatory act authorized not only townships, but also villages, cities and counties along the route of the railroad to make donations to the company. It prescribed an entirely different condition precedent to the making of a donation, and required the issue of bonds to pay the donation, when made, and it did not require the completion of the railroad or any part of it, before the bonds were issued. It did not limit the amount which might be donated to $30,000, but declared that if a majority of the votes cast at the election provided for by the act should be in favor of donation, the corporate authorities of the village, city, county, or township, as the case might be, should donate to the company the amount so voted at said election, and issue bonds in payment thereof. It thus appears that Sec. 10 of the amendatory act covered the entire subject embraced

by Secs. 9 and 10 of the original act. It related to the same railroad company; it prescribed different methods of procedure in reference to the same subject, and embraced entirely new provisions, thus plainly showing that it was intended as a substitute, pro tanto, for the original act. Sec. 10 of the amendatory act therefore operated as a repeal, by implication, of Secs. 9 and 10 of the original act, and removed the restriction limiting to $30,000 the amount which could be donated by a township to the railroad company. United States v. Tynen, 11 Wall. 88; Henderson's Tobacco, 11 Wall. 652; Murdock v. City of Memphis, 20 Wall. 590; King v. Cornell, 106 U. S. 395."

In **Murphy v. Utter**, by an act passed in 1887 the territorial legislature of Arizona constituted a board of loan commissioners for the purpose of refunding the territorial indebtedness. In 1890 Congress passed an act approving and confirming the territorial act of 1887 subject to future territorial legislation. This act was a repetition of the territorial act, with a few immaterial changes. The court said:

"The first question to be considered is as to the relation of these two acts. Is the act of Congress to be considered as an amendment or a repeal of the territorial act? It is true the preamble speaks of the territorial act as being amended, and as amended, approved and confirmed. But the language is not that of an amending act, but that of a repeated and substituted act. No attention is called to the amendments, which are not even introduced in brackets, and a careful reading and comparison of the two acts are required to discover where and how the territorial act is amended. It stands as an original piece of legislation, although its different sections contain the numbers taken from the Revised Statutes of Ariz-

ona, as well as from the original act of 1887. Both acts are complete in themselves, and each is, upon its face, independent of the other. It is impossible to say that if the territorial act were repealed, the act of Congress passed three years later would also fail in consequence thereof, because the latter is not only the later, but the paramount act. They must either stand together as two independent pieces of legislation or the general, and perhaps the sounder, rule stated in United States v. Tynen, 11 Wall. 88, be applied, that where there are two acts on the same subject, and the later act embraces all the provisions of the first, and also new provisions, and imposes different or additional penalties, the latter act operates, without any repealing clause, as a repeal of the first. In that case, the defendant was indicted under an act passed in 1813 for uttering and counterfeiting a certificate of citizenship, purporting to have been issued by a California court. Upon a demurrer being filed to the indictment, the judges differed in opinion, and the case was sent to this court upon a certificate of division. While pending here, in 1870, Congress passed another act, embracing the whole subject of fraud against the naturalization laws, including all the acts mentioned in the laws of 1813, and many others. It was held that the act of 1870 operated as a repeal of the act of 1813, and that all criminal proceedings taken under the former act failed; and that even where two acts are not, in express terms, repugnant, yet if the later act covers the whole subject of the first, and embraces new provisions plainly showing that it was intended to be a substitute for the first act, it will operate as a repeal of that act.—Citing a number of prior cases."

In **Tracy v. Tuffly**, the court said:

"And while it is true that repeals by implication are not favored by the courts, it is settled that, without express words of repeal, a

previous statute will be held to be modified by a subsequent one, if the latter was plainly intended to cover the whole subject embraced by both, and to prescribe the only rules in respect to that subject that are to govern. United States v. Tynen, 11 Wall. 88; Cook County Bank v. United States, 107 U. S. 445, 451."

In **The Paquete Habana**, it appeared that the vessel was captured as a prize of war during the Spanish-American war, and a libel for the condemnation thereof was filed April 27, 1898. The vessel was sold and the owners appealed. The suggestion was made by the government that the court had no jurisdiction to determine the appeal, as the amount involved was less than $2,000. The court said:

"'As was long ago said by Chief Justice Marshall, 'the spirit as well as the letter of a statute must be respected, and where the whole context of the law demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called in to aid that intent.' Durousseau v. United States, 6 Cranch. 307, 314. And it is a well settled rule in the construction of statutes, often affirmed and applied by this court, that 'even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act.' United States v. Tynen, 11 Wall. 88, 92; King v. Cornell, 106 U. S. 395; Tracy v. Tuffly, 134 U. S. 206, 223; Fisk v. Henarie, 142 U. S. 459, 468; District of Columbia v. Hutton, 143 U. S. 18, 27; United States v. Healey, 160 U. S. 136, 147.

We are of the opinion that the act of 1891, upon its face, read in the light of settled rules of statutory construction, and of the decisions of this court, clearly manifests the intention of

> Congress to cover the whole subject of the appellate jurisdiction from the District and Circuit Courts of the United States, so far as regards in what cases, as well as to what courts, appeals may be taken, and to supersede and repeal, to this extent, all the provisions of earlier acts of Congress, including those that imposed pecuniary limits upon such jurisdiction; and, as part of the new scheme, to confer upon this court jurisdiction of appeals from all final sentences and decrees in prize courts, without regard to the amount in dispute, and without any certificate of the District Judge as to the importance of the particular case."

In **State v. King**, King, a slave, was prosecuted under an act of 1843 and convicted of killing a white man. The act under which he was indicted was re-enacted in 1855. The same statute was re-enacted verbatim by the act of March 19, 1857, by which latter act it was declared that all laws and parts of laws conflicting with the provisions of the act, and all laws on the subject matter except what is contained in the civil code or code of practice, be repealed. The crime charged was committed prior to the passage of the act of 1857. The court said:

> "It is also urged by the District Attorney that the re-enactment and repeal were in the same statute, and when the statute embracing them was approved by the governor and duly promulgated, they then became the law at the same moment, and there was no space of time which elapsed between the enactment of the new and the repeal of the old law. This may be true, but the repeal caused the old law to cease its existence; the old law had a being up to the moment of its repeal by the new statute; after this, it was blotted from the statute book and was without life or effect; how then, can a prosecution which was comenced under

the old law, before its repeal, be now conducted under it, when it is without vitality; how can this court punish by virtue of a dead statute?

The re-enactment of a statute communicates life and vitality to it from the time the re-enactment goes into effect, and the repeal of a statute takes away all its life, vitality and effect, from the passage and promulgation of the act in which it is contained.

If this new statute merely provided a change of the mode of procedure in the trial of slaves, and had not provided that prosecutions already commenced under the old mode should be carried on to their end, then the new law would only cause the prosecutions begun under the ancient mode to cease, and prosecutions could be again instituted under the new mode, unless barred by prescription or some legal cause.

But in the case at bar, the law itself has been repealed, which denounces as a crime, the illegal act of appellant."

In **Coffin v. Rich**, the repeal was effected by a statute which substantially re-enacted the previous law. The court said:

"Nor can it make any difference that the portion of the act repealed, now under consideration, was substantially re-enacted, as a part of the repealing act. It was the same in the acts of 1836 and 1841; but it was not held to make any difference in the case above cited. If a statute is absolutely repealed, all rights under it are severed, however brief the period intervening before another similar act is passed. So legislatures have always understood it. If it were not so, when statutes are revised, codified, and re-enacted, no saving clauses and exceptions would be necessary. A person could still be convicted under a repealed criminal statute, if it was substantially re-enacted at the time of its repeal, though the repealing act contained no provision to that effect. This cannot be so. If an act is only amended, the line of

its operation is not severed. New threads are interwoven, or old ones taken out. But if it is repealed, though another like it is re-enacted, all connection between the old and the new is cut off, except what is saved by special provisions. The former statute becomes as if it had never existed. Keye v. Goodwin, 4 Moore & Payne, 341. And the new statute commences as if none had preceded it. Such, we think, is clearly the better rule of construction. 'Hence it is usual in any repealing law, to make it operate prospectively only, and to insert a saving clause, preventing the operation of the repeal and continuing the repealed law in force as to all pending prosecutions, and often as to all violations of the existing law already committed.' Com. v. Marshall, 11 Pick. 350."

In Goodno v. Oshkosh, there had been in force prior to 1868 this law:

> "When the place of trial shall be changed as provided in this chapter, it shall be changed to some county where the causes complained of shall not exist, and no more than one change in the place of trial shall be awarded in any action."

This law was by Ch. 123 General Laws 1868, amended to read:

> "When the place of trial shall be changed as provided in this chapter it shall be changed to some county where the causes complained of shall not exist, and no more than one change in the place of trial shall be awarded except upon the written stipulation of the parties or their attorneys or until one or more trials shall have been had in said county."

The court said:

> "In State v. Ingersoll, 17 Wis. 631, this court decided that where a statute provides that a certain section of a former statute shall be amended so as to read as follows, any provision

of such section not found in the new statute is repealed. It follows very clearly from that decision that whatever provision of the former statute was in force after the amendment of 1868 it was so in force because of being found in the amendatory act, and that if all or substantially all of the former section continued to be the law it was merely by reason of its having been copied into and re-enacted with the amendment. The original section as an independent and distinct statutory enactment ceased to have any existence the very moment the amendatory act was passed and went into effect, and whatever provisions of it remained as law were such solely by virtue of being again enacted in the amendment. The original section as a separate statute was as effectually repealed and obliterated from the statute book as if the repeal had been made by direct and express words and none of its provisions had been re-enacted."

(2) *The rule cannot apply to the case at bar because there is no substantial re-enactment of the earlier law.*

The Circuit Court of Appeals applied the rule on the authority of:

Steamship Co. v. Joliffe, 2 Wall. 450, 458.

Irrigation Co. v. Garland, 164 U. S. 1.

Campbell v. California, 200 U. S. 87.

Lamb v. Powder Co., 65 C. C. A. 570.

Wright v. Oakley, 5 Metc. (Mass.) 400.

Association v. Benshimol, 130 Mass. 325.

St. Louis v. Alexander, 23 Mo. 483.

Ely v. Holton, 15 N. Y. 595.

Anding v. Levy, 57 Miss. 51.

Fullerton v. Spring, 3 Wis. 588.

Glentz v. State, 38 Wis. 549.

Burwell v. Tullis, 12 Minn. 572.
Gaston v. Merriam, 33 Minn. 271.
State v. Baldwin, 45 Conn. 134.
People v. Board, 20 Colo. 220.
Moore v. Kenockee, 75 Mich. 332.
Capron v. Strout, 11 Nev. 304.
McMullen v. Guest, 6 Tex. 275.
Holden v. State, 137 U. S. 483.
Commonwealth v. Herrick, 6 Cush. 465.
State v. Gumber, 37 Wis. 298.
State v. Wish, 15 Neb. 448.
State v. Miller, 58 Ind. 399.
Sage v. State, 127 Ind. 15.
State v. Kates, 149 Ind. 46.
State v. Herzog, 25 Minn. 490.
State v. Prouty, 115 Iowa 657.
State v. Williams, 117 N. C. 753.
State v. Brewer, 22 La. Ann. 273.
Territory v. Ruval, 84 Pac. (Ariz.) 1096.
Junction City v. Webb, 44 Kans. 71.

Of the cases cited the first eighteen in the list involved private rights, and the remaining thirteen liability to punishments under statutes claimed to have been repealed. All the cases, except St. Louis v. Alexander, Moore v. Kenockee, Capron v. Strout, and McMullen v. Guest, support the abstract rule. It seems to us that none of them support the court's application of it.

In St. Louis v. Alexander, the court did not discuss the rule.

In **Moore v. Kenockee**, **Capron v. Strout** and **McMullen v. Guest**, the court did not adopt the rule, but held that the repeal did not destroy rights which had vested under the law repealed.

In the cases involving private rights the statutes claimed to have been repealed had been simultaneously re-enacted either verbatim or without change of substance. In no case had the essentials to the creation of right been added to or subtracted from; nor had the value of the right been enhanced or diminished.

In the cases involving liability to punishments the statutes claimed to have been repealed had also been simultaneously re-enacted verbatim or substantially. In no case had the quality of the acts necessary to constitute the crime been changed; nor had the punishment been augmented.

In **Wright v. Oakley**, **Fullerton v. Spring**, **State v. Prouty**, **State v. Williams**, **State v. Brewer**, and **Junction City v. Webb**, statutes were claimed to have been repealed by revised codes, which re-enacted them. It is well settled that a revision is not a new enactment but a continuation of the previous laws.

In **State v. Prouty**, and **Wright v. Oakley**, the code expressly saved rights accrued and penalties incurred and in the former a decree had been entered before the alleged repeal, enjoining the act sought to be punished as a contempt.

Steamship Co. v. Joliffe, **Irrigation Co. v. Garland**, **Campbell v. California**, **Lamb v. Powder Co.**, **Association v. Benshimol**, **Capron v. Strout** and other cases, involved private rights which had vested under the

statutes claimed to have been repealed. Such rights are saved from the repeal by the constitutional inhibitions against the impairment of contracts and the deprivation of property.

The Court of Appeals laid special stress on Holden v. State, Commonwealth v. Herrick, State v. Gumber, State v. Wish, State v. Miller, Sage v. State, State v. Herzog and Territory v. Ruval.

In **Holden v. State**, the question was whether an act of the state of Minnesota, passed in 1889, in regard to the *mode of inflicting punishment of death, was ex post facto.* The 1889 law was a substantial re-enactment of a previous law, except that it provided (as a precautionary and preparatory measure) a period of solitary confinement after the issuance of the governor's warrant for the execution. The sentence and judgment of the state court did not require the accused to be kept in solitary confinement and he had not been so kept. This action of the state courts and state authorities was a practical construction that the earlier law was continued in force as to offenses committed prior to the re-enactment, and that the provision for solitary confinement was a new enactment applicable only to offenses committed after the passage of the 1889 law. The only Federal question presented in this case was whether the Minnesota law of 1889 as interpreted and enforced by the state authorities was *ex post facto.*

This court held that the earlier law was continued; that the solitary confinement was newly enacted and could be imposed only for offenses com-

mitted after the passage of the 1889 law, and that so construed the law was not *ex post facto*. This court would have held otherwise had the action of the state authorities been different.

In this case no change had been made in either the subjective or objective elements of the crime. In addition there was in force in Minnesota a general saving statute (App., p. 156) which, under the decision of the state court (State v. Smith, 62 Minn. 540) saves penalties incurred under laws repealed.

In **Ex parte Medley, 134 U. S. 160,** there had been in force in Colorado prior to 1889 a statute defining murder and prescribing as the punishment therefor, death by hanging. After conviction the person was to be kept in the county jail and might be visited by his relatives, friends and other persons. In 1889 a law was passed providing that whenever a person should be convicted of a crime punishable by death and had been sentenced to suffer death, the penalty should be inflicted at a time to be designated by the governor in the death warrant; and that after the issuance of the warrant the prisoner should be kept in solitary confinement and visited by no person except his attendants, counsel, physician, a spiritual adviser of his own selection, and members of his family, and by these only in accordance with prison regulations. The supreme court of Colorado held that the 1889 law had repealed the earlier law and prescribed the only manner in which punishment of death might be inflicted in the future. This court accepted the construction

placed upon the law by the highest court of the state and held that the law so construed was *ex post facto*, because the change in the mode of inflicting the punishment for the crime was of such nature that it augmented the punishment.

In this case no change had been made in either the subjective or the objective elements of the crime, but the sanction provided had been changed to the detriment of the accused.

In **Commonwealth v. Herrick**, the earlier statute made the sale of spirituous liquor at retail a crime and prescribed a punishment. The earlier statute had been amended only by striking out the word "spirituous" and inserting in its stead the word "intoxicating." No change had been made in the subjective elements of the crime or in the sanction provided. The only change was in the objective elements. The class of things by means of which the crime might be committed was enlarged so as to include not only spirituous liquors, but also all other intoxicating liquors. If the amendment had been enacted as an independent statute making the sale of any intoxicating liquor other than spirituous liquor a crime and prescribing a punishment therefor, the earlier statute would have remained in force.

In **State v. Gumber**, no change had been made in either the subjective or the objective elements of the crime. The punishment had been mitigated by abolishing both the fine and imprisonment and continuing only the punishment by abatement of the nuisance.

In State v. Wish, no change had been made in the nature of the crime. The sole change consisted in shortening both the maximum and the minimum terms of imprisonment.

In State v. Miller, the act of 1852, sections 19 and 20, read:

> Sec. 19. "Every person who shall feloniously steal, take and carry, lead or drive away the personal goods of another of the value of *five dollars* or upwards, shall be deemed guilty of *grand larceny*, and upon conviction thereof shall be fined not exceeding double the value of the goods stolen, be imprisoned in the state prison not less than two nor more than fourteen years, and be disfranchised and rendered incapable of holding any office of trust or profit for any determinate period."
>
> Sec. 20. "Every person who shall feloniously steal, take and carry, lead or drive away the personal goods of another of the value of any sum *less than five dollars*, shall be deemed guilty of *petit larceny*, and upon conviction thereof shall be fined not exceeding five hundred dollars, be imprisoned in the state's prison not less than one nor more than three years, and disfranchised and rendered incapable of holding any office of trust or profit for any determinate period, or fined and disfranchised and rendered incapable of holding any office of trust or profit and imprisoned in the jail of the proper county for any determinate period of time, not exceeding one year."

By act of 1877, sections 2 and 3 the sections above were amended to read:

> Sec. 19. "Every person who shall feloniously steal, take and carry, lead or drive away the personal goods of another of the value of *fifteen dollars* or upwards shall be deemed guilty of *grand larceny*, and upon conviction thereof shall be fined not exceeding double the

value of the goods stolen, be imprisoned in the state prison not less than two nor more than fourteen years, and be disfranchised and rendered incapable of holding any office of trust or profit for any determinate period."

Sec. 20. "Every person who shall feloniously steal, take and carry, lead or drive away the personal goods of another of the value of any sum *less than fifteen dollars*, shall be deemed guilty of *petit larceny*, and upon conviction therefor shall be fined not exceeding five hundred dollars, be imprisoned in the state's prison not less than one nor more than three years, and disfranchised and rendered incapable of holding any office of trust or profit, and imprisoned in the jail of the proper county for any determinate period of time not exceeding one year."

The re-enactment worked no change in the subjective elements of the crime; nor did it make any change in the objective elements of *larceny*. It rearranged the objective elements essential to the different *degrees* of larceny. The crime was divided into two degrees solely with reference to the punishment. The re-arrangement of the degrees of the crime resulted only in mitigating the punishment for larceny of property of a value of five or more and less than fifteen dollars. For a similar case see Commonwealth v. Gardner, 11 Gray 438 (Mass.)

In **Sage v. State**, no change had been made in the elements of the crime nor in the punishment. There were changes in procedure and in the name by which the crime was designated. These changes did not affect any substantial right.

In **State v. Herzog**, no change had been made in the subjective elements of the crime. The change

in the objective elements consisted in adding to the classes of persons against whom the crime might be committed and the class of persons who might be guilty of the crime. This, however, did not change the crime.

In **Territory v. Ruval**, the only change made by the amendment was to enlarge the enumeration of property which might be subject to the offense.

The most that can be deduced from the cases cited by the Court of Appeals is:

Where a later repeals an earlier statute defining a crime and prescribing a punishment therefor, and simultaneously re-enacts it, *without change of subjective elements and without increasing the punishment*, the earlier statute is substantially re-enacted and is continued, though the later adds to the things or persons upon or against whom or by means of which the crime may be committed or to the classes of persons who may be guilty of the offense and though changes may be made in procedure and in the name by which the crime is designated.

This rule does not cover the situation in the case at bar. In this case a new subjective element is injected. The act must be *knowingly* done. The crime is thus made one of greater moral turpitude. The punishment is accordingly increased by imposing imprisonment in the penitentiary in all cases where it is possible.

The fact that the crime is still called a misdemeanor and that the punishment by imprisonment is added by a *proviso* cannot prevent the re-

peal. The infamy is equally great whether the imprisonment be imposed for an act designated a misdemeanor or for one designated a felony; whether the punishment be prescribed by a proviso, or by some other form of enactment.

If the amendment made by the Hepburn act had been one dividing the crime of rebating into two degrees for the purpose of fixing punishment, and had made the act of granting or receiving a rebate when not knowingly done punishable by a smaller fine, and the same act when knowingly done punishable by the same fine as formerly provided, the rule adopted by the Circuit Court of Appeals would apply.

The reason of the rule applied by the Court of Appeals is that there is no instant of time during which the earlier law is not in force, because the later law is not repugnant to the law it re-enacts, and hence does not repeal it.

That the reason for the rule does not exist in the present case is apparent from these considerations:

If the Elkins law as such had not been mentioned in the Hepburn act and the part of section 2 of the latter act quoted had been enacted as an independent statute, it would of necessity be held either (1) that the later statute spoke to and covered the same subject matter as the earlier, or (2) that it did not speak to and cover the same subject matter, but defined a new offense. Under the first holding the later act would be repugnant to the earlier. Under the second holding the later act would not be repugnant to the earlier. However, by the Hep-

burn act the Elkins law is amended to read as stated in the former. Therefore, under the second holding, by the form of the enactment a *new offense* has been defined and *substituted* for the offense defined by the Elkins law.

Hence under either holding the part of the Elkins law quoted necessarily ceased to exist at the instant the Hepburn act took effect, in the first case, because two repugnant laws covering the same subject matter cannot co-exist; in the second case, because the part of the Elkins law quoted was omitted from the re-enactment and a new and different provision substituted.

C.

THE REPEAL OF THE PART OF THE ELKINS LAW QUOTED WAS COMPLETE.

Whether the repeal was complete or only partial is a question of legislative intent.

The Elkins law defined an offense. The Hepburn act defines an offense. The acts of corporations in *knowingly* granting or receiving rebates are within both definitions. We think the acts are not on this account "within both the original and the amended definition" of one and the same offense, but are within the definitions of two different offenses.

To establish the crime defined in the part of the Elkins law stated by the learned Court of Appeals to have been continued by the Hepburn act it is necessary to prove in addition to the elements re-

quired by the Elkins law, the additional element injected by the Hepburn act—the *scienter*. It is hence necessary, to sustain a conviction under the Elkins law, that the accused be convicted of an offense of greater moral turpitude than attached to the offense defined in the Elkins law, and one which in the judgment of Congress merits the infamous punishment of imprisonment in the penitentiary for not to exceed two years.

Clearly the Elkins law was repealed in so far as it made criminal the acts of either persons or corporations in granting or receiving rebates, when the acts were *not knowingly* done. It is equally clear that the Elkins law was repealed in so far as it made criminal the acts of others than corporations in granting or receiving rebates even when the acts were *knowingly* done, because the crime has been made infamous and the punishment increased to include imprisonment. The failure of Congress to prescribe imprisonment for corporate offenders was not because it considered the offense of the corporation one of less degree than the offense of the individual, nor because it considered punishment by imprisonment too severe for the crime, but because the corporation cannot be imprisoned.

The Elkins law, then, was repealed at least as to all concessions from tariff granted or received, whether knowingly or not, by others than corporations. The act or crime of the officer or agent alone constitutes an act or crime of the corporation. To hold that the Elkins law remains in force only as

to the corporation is to penalize it, and through it innocent stockholders, while permitting the guilty officer to escape. Congress cannot have intended this.

The repeal cannot be severed. The part of the Hepburn act quoted in connection with section 10 repealed *in toto* the part of the Elkins law quoted.

In **Goodno v. Oshkosh, 31 Wis., 127, 130,** the court said:

> "Such being the operation of the act of 1868 the conclusion as to the operation of that of 1869 is not difficult. It repealed the whole act of 1868 as well that part which re-enacted the provisions of the original section as the part which was added to those provisions. How such a repeal can be severed and said to apply only to that portion of the act of 1868 which was new and not to affect that portion which was old or borrowed from the provisions of the previous statute is certainly not easy to be perceived. If we are to look for the intention of the legislature in the language it employs, which is the only criterion where the language is plain, then it is not easy to see that the legislature did not intend to repeal the whole act, both that which was old and that which was new or brought in when the repealed act was passed. Such is the inevitable result by every rule of statutory construction with which we are familiar."

D.

IN SO FAR AS THE ELKINS LAW MADE CRIMINAL CONCESSIONS FROM TARIFF WHEN NOT KNOWINGLY GRANTED, IT WAS REPEALED.

The Circuit Court of Appeals (Trans., p. 82) said:

> "Acts of corporate carriers in knowingly offering, granting or giving, as also acts of corporate shippers in knowingly soliciting, accepting or receiving rebates, concessions or discriminations, are within both the original and amended definition of the offense and the punishment therefor is unchanged. As to them the prior law is not abrogated or repealed, but preserved and continued; and the liability of the offender to prosecution and punishment, whether the offense was committed before or after the amendatory act, is unaffected. But in so far as the original section embraces such acts, when not knowingly done, it is undoubtedly repealed."

III.

CONGRESS, BY SECTION 10 OF THE HEPBURN ACT, MANIFESTED ITS INTENT THAT ONLY PENALTIES AND FORFEITURES INCURRED UNDER THE ELKINS LAW FOR WHICH PROSECUTIONS WERE PENDING AT THE DATE OF THE PASSAGE OF THE HEPBURN ACT SHOULD BE SAVED, AND THAT ALL OTHERS SHOULD BE REMITTED.

Section 10 is:

> "All laws and parts of laws in conflict with the provisions of this act are hereby repealed, but the amendments herein provided for shall not affect causes now pending in the courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law."

A.

CONGRESS IN SECTION 10 SPOKE TO THE SUBJECT OF SAVING PENALTIES AND FORFEITURES INCURRED UNDER THE LAWS REPEALED.

(1) *Congress is presumed to have enacted the section with knowledge of the law as to the effect of repeals.*

State v. Showers, 34 Kans. 271.

Benton v. Willis, 88 S. W. 1000.

Kleckner v. Turk, 63 N. W. 469.

O'Neill v. Mayor, 63 Atl. 986.

McCann v. New York, 52 App. Div. 358.

In State v. Showers, the court said:

> "If no saving clause were in existence no new suit could be commenced under the old

law, and all suits pending under the old law would be abated and become extinguished. * * *

The legislature, of course, knew all this, for such is well settled law. The legislature also knew of the existence of the general saving clause, and knew that it would save not only pending suits for violations of the old law, but also all suits that might be subsequently commenced."

(a) By the common law, in the absence of any saving statute, the repeal of a criminal statute remits all penalties previously incurred for which final judgment of conviction had not been had at the date of the repeal.

United States v. Tynen, 78 U. S. 88, 95.

Norris v. Crocker, supra.

State v. Railway Co., 3 How. 534.

Gregory v. Bank, 25 Am. Rep. 760; 3 Colo. 332.

Wharton v. State, 94 Am. Dec. 214; 5 Coldw. 1.

Woodburn v. Telegraph Co., 23 S. E. 116.

Mason Co. v. Commonwealth, 36 S. W. 570.

Hartsung v. People, 22 N. Y. 95.

State v. Oliver, 41 Pac. 895.

Ingersoll v. State, 17 Wis. 651.

(b) By section 13 Revised Statutes, in the absence of a special saving clause in the repealing act all penalties previously incurred under the act repealed are saved.

United States v. Reisinger, 128 U. S. 398.

Lang v. United States, 133 Fed. 204.

People v. England, 91 Hun. 152.

State v. Smith, 62 Minn. 540, 543.

Kleckner v. Turk, 63 N. W. 469.

(c) In the absence of a statute to the contrary, where the repealing act saves rights accrued and penalties incurred under the previous law and at the same time modifies the procedure by which the right is to be enforced or the penalty recovered, the procedure in an action or prosecution to enforce the right or recover the penalty must be in accordance with the later act.

Railway Co. v. Grant, 98 U. S. 398.
Railroad Co. v. Oglesby, 76 N. E. 165, 166.
Taylor v. Strayer, 78 N. E. 236, 238.
Palmer v. City of Danville, 46 N. E. 629.
Holcomb v. Boynton, 37 N. E. 1031.

(2) *The language of the section is peculiarly apt for the saving of pending causes and the procedure therein.*

While the general repealing clause of this section added nothing to the repealing effect of the Hepburn act (United States v. Claflin, 97 U. S. 546, 551; Turner v. State, 69 S. W. 774; Wichita v. Telephone Co., 78 Pac. 886) it was an appropriate introduction to the saving clause which follows and was doubtless inserted for this purpose.

The language of the section is that commonly used by legislatures in the enactment of saving statutes. Of the states, thirty-seven have enacted such statutes. Of these twenty-eight have enacted substantially in the language of section 10. The saving statutes of the states are contained in the Appendix, pp. 151, ff.

Congress has frequently used similar language for a similar purpose. Section 4 of the Elkins law is:

> "All acts and parts of acts in conflict with the provisions of this act are hereby repealed, but such repeal *shall not affect causes now pending nor rights which have already accrued*, but such causes shall be prosecuted to a conclusion and such rights enforced in a manner heretofore provided by law and as modified by the provisions of this act."

Members of the Congress come from the states and are familiar with state legislation. Naturally in enacting a saving statute they adopted a form of enactment with which they were familiar.

Section 10 can have no effect other than to save penalties, forfeitures and liabilities incurred under the repealed laws, because a statute affecting substantial rights is usually construed to have only a prospective operation.

The legal effect of section 10 is the same as if it read:

> "All laws and parts of laws in conflict with the provisions of this act are hereby repealed, but such repeal shall not release or remit penalties, forfeitures or liabilities incurred under any such law for which actions or prosecutions are now pending in the courts of the United States, but such actions and prosecutions shall proceed to a conclusion in the manner heretofore provided by law."

The prosecution claims, and the Circuit Court of Appeals and the various district courts have held that section 10 is a *saving* statute in that as to pending causes it saved procedure.

(3) *The word "causes" as used in the section includes criminal cases.*

Blyew v. United States, 13 Wall. 581, 591.

Erwin v. United States, 37 Fed. 471, 479.

Taylor v. United States, 45 Fed. 531, 539.

State v. Hancock (N. J.), 24 Atl. 726, 728.

In **Erwin v. United States**, the court said:

> "The question is raised whether such proceedings are 'causes' within the meaning of the fee-bill for which a docket fee can be taxed. Mr. Bouvier defines a 'cause' to be 'any question, civil or criminal, contested before a court of justice.' 'Case' and 'cause' are synonymous."

In **State v. Hancock**, the court said:

> "It is true that the term 'cause' sometimes expresses a suit or action, but it has a broader signification which comprises the prosecution of a purpose or object, and it seems to me that the word 'cause' in this act is used in the sense expressed by the word 'prosecution.'"

Congress, in the Hepburn act itself, uses "causes" as including criminal causes. In paragraphs 11 and 12 of section 16 of the Interstate Commerce Act as amended by section 5 of the Hepburn act, the word "causes" is so used. (App., pp. 137, 138.) In paragraphs 11 and 12 occurs this language: "and in such court the case shall have priority in hearing and determination over all *other causes except criminal causes.*" The word is used in the sense in the proviso at the end of paragraph 12. It should be given the same meaning in section 10. The word "suit" is used when civil actions are meant.

The causes saved by the section are to be "prosecuted" in the manner provided by previous laws. "Prosecute" ordinarily denotes a criminal proceeding.

59

United States v. Reisinger, 128 U. S. 398, 403.
United States v. Ulrici, 3 Dill. 532.

In **United States v. Reisinger**, Mr. Justice Lamar quoted with approval the language of Mr. Justice Miller in **United States v. Ulrici**:

> "Besides, as my brother Treat reminds me, the word 'prosecution' is used in this section, and that usually denotes a criminal proceeding."

"Prosecution" is used in section 13 Revised Statutes with reference to criminal proceedings.

Claims for damages are saved by the proviso at the end of paragraph 2 of amended section 16. The proviso is:

> "That claims accrued prior to the passage of this act may be presented within one year."

Section 10 was therefore not necessary to this end.

(4) *The fact that what is now section* 10 *was part of the Hepburn bill from the time of its introduction while the amendment of section* 1 *of the Elkins law was inserted at a later stage does not make against petitioner's contention.*

The Hepburn bill passed the House without amendment except as to the title, and was introduced in the Senate February 8, 1906. The bill was reported without amendment by the Senate Committee February 26. At that time the bill did not include the amendment of section 1 of the Elkins law.

May 7, 1907, in Committee of the Whole, the bill was amended by including in section 2 an amend-

ment of the Elkins law. The amendment re-enacted section 1 without change except in the second paragraph. The amendment in this paragraph consisted of inserting the words "or shipper" in two places. (Cong. Rec. p. 6599.)

May 10, 1906, punishment by imprisonment was inserted in lieu of that part of the section which enacted that imprisonment should not be imposed. (Cong. Rec. p. 6826.)

May 11, 1906, sections 1, 2, 3 and 4 of the bill as amended in Committee of the Whole of the Senate were ordered printed. The amended sections as printed include the amendment of section 1 of the Elkins law, and also amendment of section 10 of the original act to regulate commerce, by adding a paragraph defining the crime of accepting or receiving rebates. This latter amendment included at the end thereof this:

> "Provided, that the foregoing penalties shall not apply to rebates or considerations received prior to the passage and approval of this act."

The bill was subsequently further amended in Committee of the Whole. That part of section 2 amendatory of section 1 of the Elkins law was changed by inserting the words "whether carrier or shipper," and by requiring the act of giving or accepting rebates, to be a crime, to be "knowingly and wilfully" committed, and by making the paragraph contained in the print of May 11, as an amendment to section 10 of the original act to regulate commerce a part of the amendment of section

1 of the Elkins law. (Cong. Rec. pp. 7230, 7231, 7232.) The entire bill, with all the amendments, was printed May 17, 1906.

The parts of section 2 of the bill here material as the same appear in the prints of May 11 and 17 are contained in the Appendix, pp. 145-151.

In the print of May 17, 1906, section 2 of the Hepburn bill included at the end thereof the following:

> "Provided, that the foregoing penalties shall not apply to rebates or considerations received prior to the passage and approval of this act."

May 18, the bill passed the Senate in the form of the print of May 17.

The House did not concur in the Senate amendments, and the bill went to conference. The conference committee reported June 2. The report struck out the words "knowingly and wilfully" as a part of the definition of the crime, and retained the last paragraph of section 2 as part of the amended section 1 of the Elkins law, but struck out the proviso at the end of the paragraph. (Cong. Rec. pp. 7963-8008.)

This conference report was not agreed to by the two houses, and a further conference was ordered by the Senate June 7, and by the House June 12. The second conference committee made its report June 23. This report restored the word "knowingly" as a part of the definition of the crime and retained the last paragraph of section 2 of the bill as a part of the amended section 1 of the Elkins

law. It did not restore the proviso. In this form the bill became a law.

It is evident from the proceedings subsequent to the introduction of the amendment of the Elkins law that the question whether or not any penalties previously incurred under the Elkins law should be remitted, and if so, what penalties, received the attention of Congress.

The proviso at the end of section 2 of the Hepburn bill as first passed by the Senate was inconsistent with the special saving clause in section 10, because it remitted all penalties incurred by receivers of rebates whether prosecutions were then pending or not.

Congress finally determined that shippers and carriers should be placed on an equal footing; that as to each of them penalties involved in pending prosecutions should be saved and all others remitted. Section 10 was retained and the proviso at the end of section 2 stricken out for this purpose.

This construction is borne out by the fact that a joint resolution was introduced June 28, 1906, which attempted to postpone the taking effect of the Hepburn act until sixty days after its passage and approval. This resolution passed the Senate June 29 and the House the same day, but the House amended the title. The Senate did not concur in the amendment until June 30, on which date the resolution was approved.

It was known to the members of Congress that the government had for months been investigating the subject of rebates accepted by large shippers.

Evidence of such acts had been secured. Prosecutions had not been instituted. These prosecutions were not saved by the Hepburn act unless they could be instituted before the act became effective.

It may be that the plan failed because the joint resolution was not finally adopted and approved until one day after the Hepburn act had become a law. (United States v. Standard Oil Co., 148 Fed. 719, 722.) This cannot defeat the meaning of section 10.

The act as it finally passed embodies the intent of Congress. What that intent was is to be gathered from the language of the act and not from the variations, if any, in the opinions of individual members during the pendency of the bill.

> United States v. Freight Ass'n., 166 U. S. 290, 318.
>
> United States v. Railway Co., 91 U. S. 72, 79.
>
> Aldrich v. Williams, 3 How. 9, 24.

In **United States v. Freight Association,** the history of the passage of the Sherman Anti-trust Act was discussed. The history of that act was similar to the history of the act here involved. The bill had passed the Senate; had been amended in the House; the Senate had failed to concur in the amendment and the bill went to conference. The first conference report was disagreed to and another conference was had. The court said:

> "Looking simply at the history of the bill from the time it was introduced in the Senate until it was finally passed, it would be impossible to say what were the views of a majority

of the members of each house in relation to the meaning of the act. It cannot be said that a majority of both houses did not agree with Senator Hoar in his views as to the construction to be given to the act as it passed the Senate. All that can be determined from the debates and reports is that various members had various views, and *we are left to determine the meaning of this act, as we determine the meaning of other acts, from the language used therein.*

There is, too, a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body."

The *italics* are ours.

B.

UNDER THE SETTLED RULES FOR THE INTERPRETATION OF STATUTES, SECTION 10 WILL BEAR NO CONSTRUCTION OTHER THAN THAT CLAIMED BY PETITIONER.

(1) *Where the language of the statute is clear there is no room for construction.*

Northern Securities Co. v. United States, 193 U. S. 197, 358.

United States v. Fisher, 2 Cranch. 358, 399.

United States v. Wiltberger, 5 Wheat. 76, 95.

Wilkinson v. Leland, 2 Pet. 627, 662.

Pennington v. Coxe, 2 Cranch. 33, 52.

Lake County v. Rollins, 130 U. S. 662, 670.

Thornley v. United States, 113 U. S. 310, 313.

Doe v. Considine, 6 Wall. 458, 479.

United States v. Fisher, 109 U. S. 143, 145.

Doggett v. Railroad Co., 99 U. S. 72, 78.

Lewis v. United States, 92 U. S. 618, 621.

Gibbons v. Ogden, 9 Wheat. 1, 188.

Beardstown v. Virginia, 76 Ill. 34, 40.

Hills v. Chicago, 60 Ill. 86, 90, 91.

In **United States v. Fisher, 2 Cranch. 399,** the court said:

> "Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction."

In **United States v. Wiltberger,** the court said:

> "The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words there is no room for construction."

In **Wilkinson v. Leland,** the court said:

> "This is a legislative act and is to be interpreted according to the intention of the legislature apparent upon its face."

In **Pennington v. Coxe,** the court said:

> "That a law is the best expositor of itself; that every part of an act is to be taken into view for the purpose of discovering the mind of the legislature; and that the details of one part may contain regulations restricting the extent of general expressions used in another part of the same act, are among those plain rules laid down by common sense for the exposition of statutes, which have been uniformly acknowledged."

In **Lake County v. Rollins,** the court said:

> "To get at the thought or meaning expressed in a statute, a contract or a constitution, the first resort in all cases is to the natural signification of the words in the order of grammatical arrangement in which the framers of

the instrument have placed them. If the words convey a definite meaning, which involves no absurdity nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have a right to add to it or take from it. * * * So also, where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction."

In **Thornley v. United States**, the court said:

"Where the meaning of a statute is plain it is the duty of the courts to enforce it according to its obvious terms. In such case there is no necessity for construction."

In **Doe v. Considine**, the court said:

"The language of this clause is plain and unambiguous. There is nothing in the contract, rightly considered, which qualifies or affects it. There is, we think, no room for construction. Armstrong v. Miller, 6 Ohio 124. We concur entirely in the views of the eminent counsel whose professional opinions long since written have been submitted to us. We think the point hardly admits of discussion. If there could be any doubt on the subject it is removed by the act of 1835, which substitutes for the rule here under discussion the one which we are asked to apply. Were we to adopt the construction claimed by plaintiff's counsel instead of adjudicating we should legislate. That we have no power to do. Our function is to execute the law, not to make it."

In **Gibbons v. Ogden**, the court said:

"As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they

intend to convey, the enlightened patriots who framed our constitution and the people who adopted it must be understood to have employed words in their natural sense, and to have intended what they have said."

In **Beardstown v. Virginia**, the court said:

"Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction."

In **Hills v. Chicago**, the court said:

"Whether in case of a clause of doubtful import such reference to extrinsic matters might or might not be proper we will not stop to inquire; for the doctrine is firmly established that where the words employed when taken in their ordinary and natural signification and the order of their grammatical arrangement given them by the framers, embody a definite meaning, which involves no conflict with other parts of the same instrument, then that meaning which is apparent upon the face of the instrument is the only one we are at liberty to say was intended to be conveyed, and there is no room for construction. That which the words declare is the meaning of the statute; and neither courts nor legislatures have a right to add to or take away from that meaning."

(2) *A statute must be so construed as to give effect to every word and clause of it.*

Platt v. Railroad Co., 99 U. S. 48, 58.

Market v. Hoffman, 101 U. S. 112, 115.

Crozer v. People, 69 N. E. 489, 491.

Perteet v. People, 65 Ill. 230, 233.

Insurance Co. v. State, 89 S. W. 42, 44-45.

Railroad Co. v. Traction Co., 48 S. E. 746.

Association v. Sohn, 46 S. E. 222.
State v. Fontenot, 36 So. 630.
Newell v. People, 7 N. Y. 9, 98.

In **Platt v. Railroad Co.**, the question was upon the construction of an act of Congress granting lands to the Union Pacific Railroad Company. The second section of the act declared that all lands granted by the act which should not be sold or disposed of by the railroad within three years after the entire road should have been completed should be subject to settlement and pre-emption. Certain of the lands granted were not sold within three years after the road was completed. However, the lands had been mortgaged. It was contended that the mortgaged lands were not "sold or disposed of;" that these words had precisely the same meaning as the word "sold."

The court said:

> "What did Congress mean in the act of 1862? That something else than a sale, either total or partial, was intended, we are required by all the rules of construction to conclude. Congress is not to be presumed to have used words for no purpose. If it was intended that only land which had been sold before three years had expired after the entire completion of the railroad should be exempted from pre-emption, the words 'or disposed of' were entirely superfluous. But the admitted rules of statutory construction declare that a legislature is presumed to have used no superfluous words. Courts are to accord a meaning, if possible, to every word in a statute. In Com. v. Alger, 7 Cush. 53, 89, it was said that in putting a construction upon any statute every part must be regarded and it must be so expounded, if practicable, as to give some effect

to every part of it. So, in People v. Burns, 5 Mich. 114, it was held that some meaning, if possible, must be given to every word in a statute, and that where a given construction would make a word redundant, it was reason for rejecting it. To the same effect is Dearborn v. Brookline, 97 Mass. 466; and in Gates v. Salmon, 35 Cal. 576, it was ruled that no words are to be treated as surplusage or as repetition. The phrase 'or disposed of' must therefore have some distinctive meaning, some meaning beyond the word 'sold.'"

In **Market** v. Hoffman, the court said:

"We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgement, Sec. 2, it was said that 'a statute ought upon the whole, to be so construed that if it can be prevented no clause, sentence or word shall be superfluous, void or insignificant.' This rule has been repeated innumerable times."

In **Crozer** v. **People**, the court said:

"It is a cardinal rule of construction that a statute should be so construed that if it can be prevented no clause, sentence or word shall be superflous, void or insignificant; but that it shall be so construed if possible that every sentence and word shall be given its ordinary meaning and acceptation."

In **Perteet** v. **People**, the court said:

"The good expositor makes every sentence have its operation; gives effect to every word; will not construe it so that anything shall be vain or superfluous, but so expressed that one part of the act may agree with the others, and all may stand together."

In **Newell v. People**, the court said:

> "These words are as broad in their signification as any which could have been selected for the occasion from our vocabulary, and there is not a syllable in the whole instrument tending in the slightest degree to limit or qualify the universality of the language. If the clause can be so construed that it shall not extend alike to all corporations, whether public or private, it may then, I think, be set down as an established fact that the English language is too poor for the framing of fundamental laws which shall limit the powers of the legislative branch of the government."

(3) *Congress is presumed to have intended to save only the causes it specifically mentioned.*

McIver v. Ragan, 2 Wheat. 25, 29.

Denn v. Reid, 10 Pet. 524, 527.

Bank v. Dalton, 9 How. 522, 529.

Railway Co. v. Grant, 98 U. S. 398, 403.

Troup v. Smith, 20 Johns. 33.

Coffin v. Rich, 45 Me. 507, 511.

Beardstown v. Virginia, 76 Ill. 34, 39.

Perkins v. Thornburgh, 10 Cal. 190, 192.

Lewis' Sutherland Stat. Constr., Sec. 493.

In **McIver v. Ragan**, the court said:

> "Whenever the situation of the party was such as, in the opinion of the legislature, to furnish a motive for excepting him from the operation of the law, and the legislature has made the exception, it would be going far for this court to add to those exceptions."

In **Denn v. Reid**, the court said:

> "But it is not for the court to say, where the language of the statute is clear, that it shall be so construed as to embrace cases, because

no good reason can be asigned why they should be excluded from its provisions. We are unable to see why the benefits of this statute were given to those who held under deeds proved by subscribing witnesses and withheld from those whose deeds were proved by the acknowledgment of the grantor. In most cases, if not in all, proof by acknowledgment would be deemed more satisfactory than by witnesses; but the legislature, having made a distinction between the cases—whether it was intentional or not, reasonable or unreasonable—the courts are bound by the clearly expressed language of the act."

In **Bank v. Dalton**, the court said:

"If the legislature makes no exception, the courts of justice can make none, as this would be legislating."

In **Railway Co. v. Grant**, the court said:

"If, as is contended, the object of Congress was to raise our jurisdictional amount because of the increase of judicial force in the district, we see no good reason why those who had commenced their proceedings for review of old judgments should be entitled to more consideration than those who had not. No declaration of any such object on the part of Congress is found in the law; and when, if it had been the intention to confine the operation of what was done to judgments thereafter rendered, or to cases not pending, it would have been so easy to have said so, we must presume that Congress meant the language employed should have its usual and ordinary signification, and that the old law should be unconditionally repealed."

In **Troup v. Smith**, the court said:

"Courts of law are expressly bound by the statute. * * * Where the legislature in the same statute gives an extension of it in

certain specific cases it would be an assumption of the legislative authority to introduce any other proviso."

In **Coffin v. Rich**, the court said:

"It is said, however, that the legislature could not have intended by this repeal to change the existing liabilities of members of corporations, and that they must have intended to save not only pending actions, but pre-existing liabilities also. Why they did not except such liabilities from the operation of the repealing act is not for us to say. Whether by design or mistake the effect is the same. It is only when the words of a statute are obscure or doubtful that we have any discretionary power in giving them construction, or can take into consideration the consequences of any particular interpretation."

(4) *The enumeration in a statute of certain things to be unaffected, by implication excludes all others.*

Durousseau v. United States, 6 Cranch. 307, 314.

United States v. Aredondo, 6 Pet. 691, 725.

Ex parte McCardle, 7 Wall. 506.

McHenry v. Alford, 168 U. S. 651, 672.

State v. Showers, 34 Kans. 271.

Lewis' Sutherland Stat. Constr., Sec. 493.

In **Durousseau v. United States**, the court said:

"The appellate powers of this court are not given by the judicial act. They are given by the constitution. But they are limited and regulated by the judicial act and by such other acts as have been passed on the subject. When the first legislature of the union proceeded to carry the third article of the Constitution into effect they must be understood as intending to

execute the power they possessed of making exceptions to the appellate jurisdiction of the supreme court. They have not, indeed, made these *exceptions in express terms.* They have not declared that the appellate power of the court *shall not extend to certain cases;* but they have described affirmatively its jurisdiction and this affirmative description has been understood to imply a negative on the exercise of such appellate power as is not comprehended within it. The spirit as well as the letter of a statute must be respected, and where the whole context of the law demonstrates a particular intent in the legislature to effect a certain object some degree of implication may be called in to aid that intent. It is upon this principle that the court implies a legislative exception from its constitutional appellate power in the legislative affirmative description of those powers. Thus a writ of error lies to the judgment of a circuit court where the matter in controversy exceeds the value of 2,000 dollars. There is *no express declaration that it will not lie* where the matter in controversy shall be of less value, *but the court considers this affirmative description as manifesting the intent of the legislature to except from its appellate jurisdiction all cases decided in the circuits where the matter in controversy is of less value,* and implies negative words."

The *italics* are ours.

In **Ex parte McCardle,** the foregoing language was approved.

In **United States v. Aredondo,** the court said:

"Expressio unius est exclusio alterius is a universal maxim in the construction of statutes."

In **McHenry v. Alford,** the court said:

"This implied release of the taxes for the year 1888, which the authorities had assumed

to levy under the general law and not under the provisions of the act of 1883, arises from the language of the act of 1889, and is just as strong and just as clear as if it had been stated in so many words in that act. That which arises by plain and clear implication from the language used in an act is as much a part of the act as if the implication had been embodied in so many words."

In **State v. Showers**, the court said:

"It (the legislature) expressly saves some things. Therefore it must be inferred that it intended to save no others. Expressio unius est exclusio alterius."

In **Lewis' Sutherland Stat. Constr.**, it is said:

"Where a statute enumerates the persons or things to be affected by its provisions, there is an implied exclusion of others; there is then a natural inference that its application is not intended to be general. * * * When a statute specifies the effect of a certain provision, courts will presume that all the effects intended by the lawmakers are stated. * * * When a revisory act prescribes its operation upon a previous act, it will have no other effect."

(5) *Petitioner's contention alone is in harmony with the foregoing rules.*

Causes are matters of the substantive law, which creates rights, duties and obligations.

United States v. Rhodes, 27 Fed. Cas. 785, Case No. 16,151.

People v. Dodge (Cal.), 38 Pac. 203, 204.

In **United States v. Rhodes**, the court said:

"Burrell, in his law dictionary, thus defines 'cause': 'The origin or foundation of a thing, as of a suit or action; a ground of action.' 1 Const. 470. The phrase 'causes, civil and crim-

> inal' must be understood in the sense of causes of civil action and causes of criminal prosecution."

In **People v. Dodge**, the court said:

> "The term 'cause of action' is defined as 'the right which a party has to institute and carry through a proceeding.' And. Law. Dict., citing in support of the definition, Meyer v. Van Collem, 28 Barb. 231. Black defines it as 'matter for which an action may be brought; the ground on which an action may be sustained; the right to bring a suit.' "

Procedure is a matter of the adjective law, which prescribes the forms by which matters of substantive law may be enforced or vindicated.

Holland Jurisprudence, First Am. Ed., p. *78.

Congress, by section 10, has spoken both to matters of substance and to matters of form—both to causes and to the procedure therein. With knowledge of the principles which, in the absence of an enactment by it to the contrary, would apply to the repeal, it adopted a different rule from either that prescribed by the common law or that prescribed by section 13. It saved only *causes pending* in the courts of the United States at the date of the repeal. As to those causes it saved, also, the *procedure* prescribed by previous laws. *Hence the use of the word "but," to indicate in each instance the antithesis between the rule enacted and the rule which would otherwise govern.*

For the purposes of section 10 Congress necessarily divided penalties, forfeitures and liabilities incurred under laws repealed by the Hepburn act

o two classes (1) those for which actions or osecutions were pending, and (2) those for which ions or prosecutions had not been instituted at e date of the passage of the act. It expressly ved the former. It did not save, and hence by plication released and remitted the latter.

Congress has, by implication, enacted that the endments and repeal wrought by the Hepburn shall affect causes not pending at the date of e passage of the act; and of necessity that the evious law should not apply to and govern such ses. Clearly the increased punishment provided the Hepburn act cannot be imposed for offenses mmitted prior to its passage. Such construction uld make it *ex post facto,* in violation of the nstitution of the United States.

Kring v. Missouri, 107 U. S. 221, 235.
Ex parte Medley, supra.
Commonwealth v. McDonough, 13 Allen 581.
State v. Smith, supra.
State v. Ingersoll, 17 Wis. 651.
State v. Showers, 34 Kans. 271, 274.

n **Kring v. Missouri,** the court said:

"We are of opinion that any law passed after the commission of an offense which, in the language of Mr. Justice Washington, in United States v. Hall, 'in relation to that offense or its consequences alters the situation of a party to his disadvantage' is an *ex post facto* law, and in the language of Denio, J., in Hartung v. The People, 'No one can be criminally punished in this country except according to a law prescribed for his government by the sovereign authority before the imputed offense was committed and which existed as a law at the time.'"

In State v. Ingersoll, the court said:

> "That the statute of 1862 could not apply to this offense was conceded on the argument, since it makes the act of selling liquor without a license punishable in a manner different from what it was when committed. It imposes a severer penalty than was provided by the law in force in 1861, and would therefore be obnoxious to the objection of being an *ex post facto* law if intended to apply to any offense committed before its passage."

If the amended definition of the crime applies to prosecutions instituted after, for offenses committed before, the passage of the Hepburn act, it is necessary to convict offenders of a crime of greater infamy than attached to the act when it was committed.

Congress cannot have intended the amendments and repeal wrought by the Hepburn act to have any effect on causes arising under the Elkins law, but not pending at the date of the repeal, other than to remit the causes of action or prosecution, and the penalties and liabilities involved in them. Congress must have intended that section 10 should be valid and effective.

In Kleckner v. Turk, 63 N. W. 469, the repealing act expressly stated that the new law should apply to cases pending or afterwards brought.

The court said:

> "The general saving clause of our statute would have saved all actions pending under the provisions of the sections repealed or causes of action not in suit that accrued prior to the passage of the repealing act, if it had not been expressed in or clearly shown by the statute of 1891 which repealed sections 136 and

139 that it was not the purpose of the legislature that such pending actions and those accrued but not in suit should be preserved."

To limit the effect of the section to the saving of procedure is to make it an idle enactment; to deny effect to all save the last clause. The general repealing clause serves no purpose other than to introduce the saving clause. To hold that the saving clause relates only to procedure is to ignore the words, "but the amendments herein provided for shall not affect *causes* now pending in the courts of the United States." Had Congress intended the section to have a limited scope it could have so stated in fewer words, thus: "but causes now pending in the courts of the United States shall be prosecuted to a conclusion in the manner heretofore provided by law."

The Hepburn act made no important changes in the procedure applicable to any civil cause which could have been pending at the date of its passage.

Amendments of sections 14, 15 and 16 of the original Interstate Commerce Act are made by the Hepburn act. The amendment of section 14 merely Specially requires the Commission, in case it awards damages to a shipper, to include findings of fact on which such award is made. This amendment could not affect procedure in any cause pending in the courts of the United States, because it has reference only to future proceedings of the Commission, and claims for damages cannot reach the courts until

the Commission has passed upon them. It does affect the cause—the substantial right.

Railroad Co. v. Tift, 206 U. S. 428.

Railway Co. v. Abilene Oil Co., 204 U. S. 426.

The amendment of section 15 confers upon the Interstate Commerce Commission a power which it never had until the Hepburn act became a law, namely, the power to determine a reasonable rate which shall take effect at a stated time in place of a rate found to be unreasonable. This could not affect procedure in pending causes.

Section 16, as amended, enacts a procedure by which an aggrieved carrier may review the order of the Commission fixing a rate for the future. This procedure cannot affect the procedure in any cause pending at the date of the passage of the Hepburn act, because the Commission, prior to the passage of that act, could not make an order fixing a reasonable rate; hence there could not be any cause pending to review such an order.

Section 16 has also provided for the bringing of suits in the courts of the United States to enforce awards of damages made by the Commission on complaints of shippers. Original section 16 did not provide for the enforcement of these awards in the courts except so far as this provision was included in that part of the original act which stated that whenever a carrier should violate or refuse to perform any order of the Commission founded upon a controversy requiring a trial by jury, any person interested might apply to the Circuit Court of the

United States *in a summary way by petition*, alleging the violation. Under the amended section 16, if the carrier does not pay the award of damages the person in whose favor it is made may apply to the Circuit Court of the United States *by petition*, setting forth briefly the cause for which he claims damages and the order of the Commission thereon. The importance of this change is not appreciated by petitioner.

In addition, amended section 16 makes certain records of the Commission *prima facie* evidence in causes. This, if it changes the law in any respect, may in a sense affect procedure. It affects the proof. It relates to proof in both civil and criminal causes. It may also affect substantial rights. As applied to prosecutions for offenses committed prior to the passage of the Hepburn act it may be *ex post facto*.

Hopt. v. Utah, infra.

Amended section 16 also changes the former law so as to permit appeals to the Supreme Court without regard to the amount involved.

The amendment of section 16 also included provisions imposing severe penalties upon carriers for failure to obey orders of the Commission. (App., p. 135.) These penalties are to be recovered in a civil suit instead of by criminal prosecution. There could, however, be no cause pending for the recovery of such penalties because the penalties could not have been incurred prior to the passage of the Hepburn act.

The foregoing states the sum of the *changes* in procedure. These changes are far less radical than the changes made in the definition of the crime and the character of the punishment provided in the Elkins law. The changes in procedure could have no application to any pending cause, even had Congress not enacted that pending causes should be prosecuted to a conclusion in the manner provided by the law in force prior to the passage of the Hepburn act, for the reason that no cause could have previously arisen to which the new procedure was applicable.

C.

FAIRNESS AND GOOD FAITH JUSTIFIED THE REMISSION OF PENALTIES FOR PREVIOUS OFFENSES NOT IN PROSECUTION.

It is well settled that a statute will be so construed as to avoid injustice and unfairness on the part of the government.

Red Rock v. Henry, 106 U. S. 596, 604.

Broughton v. Pensacola, 93 U. S. 266, 269.

United States v. Railroad Co., 118 U. S. 235, 240.

Lau Ow Bew v. United States, 144 U. S. 47, 59.

Frost v. Wenie, 157 U. S. 46, 59.

In **Red Rock v. Henry**, the court said:

> "There is another consideration which is entitled, in our opinion, to some weight; that is that before the act of 1870 was passed the railroad company had made considerable progress in performing the conditions upon which the town of Red Rock had agreed to issue its bonds. It had located its line of road according to the

proposition made by the town, and had, for more than two months, been engaged in constructing its road upon that line. It is true, it was under no binding contract with the town to go on and complete the line; but it had unmistakably manifested its purpose to do so and had expended and was expending large sums of money in an effort to comply with the conditions upon which the town had agreed to issue its bonds. If, under these circumstances, the legislature had withdrawn the authority of the town to issue its bonds, or had imposed new conditions upon the issue, *it would have acted in bad faith. If possible we should give such construction to the act of the legislature as would relieve the state from such an imputation.*"

In **Broughton v. Pensacola**, the court said:

"The inhibition of the constitution, which preserves against the interference of the state the sacredness of contracts, applies to the liabilities of municipal corporations created by its permission; and although the repeal or modification of the charter of a corporation of that kind is not within the inhibition, yet it will not be admitted, where this legislation is susceptible of another construction, that the state has in this way sanctioned an evasion of or escape from liabilities the creation of which it authorized. When, therefore, a new form is given to the old municipal corporation or such a corporation is reorganized under a new charter, taking in its new organization the place of the old one, embracing substantially the same corporators and the same territory, it will be presumed that the legislature intended a continued existence of the same corporation, although different powers are possessed under the new charter and different officers administer its affairs; and in the absence of express provision for their payment otherwise it will also be presumed in such case that the legislature intended that the liabilities as well

as the rights of property of the corporation in its old form, accompanied the corporation in its reorganization. That such was the intention of the state of Florida in the present case we have no doubt. To suppose otherwise would be to impute to her insensibility to the claims of morality and justice, which nothing in her history warrants."

In **United States v. Railroad Co.**, the court said:

"There is another view of this controversy which seems to us conclusive. As the contract between the United States and the Railroad Company contained in the acts of July 1, 1862, and July 2, 1864, has been interpreted by this court to authorize the retention by the government of compensation for services only on those roads which the United States aided in building, the construction which the appellant seeks to put on the second section of the act of May 8, 1878, would not only render that section a breach of faith on the part of the United States, but an invasion of the constitutional rights of the appellee. We are bound if possible so to construe the law as to lay it open to neither of these objections. * * * The construction contended for by the appellee preserves the good faith of the government and frees the act from the imputation of impairing rights secured by the constitution of the United States."

In **Lau Ow Bew v. United States**, the court said:

"Nothing is better settled than that statutes should receive a sensible construction such as will effectuate the legislative intention and if possible so as to avoid an unjust or an absurd conclusion."

In **Frost v. Wenie**, the court said:

"No trace can be discovered in the various legislative enactments relating specifically to the Osage trust lands of any intention on the

> part of Congress to disregard the terms of its treaties with the Osage Indians; and consequently the act of December 15, 1880, should not be construed as impairing the rights of the Indians unless such a construction be unavoidable. * * * Acting Secretary of the Interior Muldrow says: 'However we may construe the act of December 15, 1880, with reference to the disposal of the greater part of the reservation relinquished by said act lying north of the Osage lands, it should not be so construed as to impair or defeat the rights of the Indians guaranteed by the treaty of 1865."

Section 20 of the Interstate Commerce Act as amended by section 7 of the Hepburn act (App., p. 138) has conferred upon the Interstate Commerce Commission extraordinary visitorial powers never before granted by the Federal Government to any board or person. The Commission may prescribe forms of accounts to be kept by carriers, and may at any time, by its members or any of its agents, examine all of the carriers' books, vouchers and memoranda; discover every departure from tariff; ascertain the names of the officers who authorized it, and the name of the shipper in whose favor it was made. The books of a carrier are now open to the Interstate Commerce Commission to the same extent as to the carriers' own officers. The carrier is thus compelled to furnish the evidence of its own guilt, if any there be.

Under Article 5 of the amendments to the Constitution of the United States, which provides that no person shall be compelled, in a criminal cause, to be a witness against himself, it has been necessary in all cases where Congress has required an individual to produce evidence of his own guilt, to

also grant him immunity from prosecution on account of the acts disclosed by the evidence produced. It was thought by many that a corporation was a person within the meaning of this clause of the 5th amendment.

In **Hale v. Henckel, 201 U. S. 43,** (March, 1906) this court held that a corporation was not a person within the meaning of this particular clause of the 5th amendment, and that it could not claim immunity because its books and papers were laid open to the scrutiny of prosecuting officials. The court, page 74, said:

> "Upon the other hand, the corporation is a creature of the state. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises and holds them subject to the laws of the state and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a state, having chartered a corporation making use of certain franchises, could not, in the exercise of its sovereignty, inquire how these franchises had been employed and whether they had been abused and demand a production of the corporate books and papers for that purpose."

The Congress of the United States, as to the interstate business of carriers, has the same powers as have the state legislatures over the other affairs of corporations of the respective states.

> Northern Securities Co. v. United States, 193 U. S. 197.

Under the Hepburn act the Interstate Commerce Commission might investigate matters occurring long prior to the passage of that act. The act would not on that ground be *ex post facto.*

In **Hopt v. Utah, 110 U. S. 574, 590,** the court said:

> "Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof in amount or degree than was required when the offense was committed might in respect to that offense be obnoxious to the constitutional inhibition upon *ex post facto* laws. But alterations which do not increase the punishment nor change the ingredients of the offense or the ultimate facts necessary to establish guilt, but leaving untouched the nature of the crime and the amount or degree of proof essential to conviction only removes existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right and which the state, upon grounds of public policy, may regulate at pleasure."

Congress, at the date of the passage of the Hepburn act, knew that the law was settled as above stated. *It recognized the 5th amendment as a declaration of governmental policy, and applied the spirit to a situation not strictly within the letter of the amendment.* In order to protect carriers, shippers and their officers from numerous prosecutions for offenses committed prior to the passage of the Hepburn act, upon evidence discovered by means of the visitorial power conferred, it remitted penalties for past offenses. There was no bad faith in saving pending prosecutions because the government had, from sources other than the carriers' books, discovered evidence of the violations involved in those prosecutions.

D.

THE MANIFEST INTENT OF CONGRESS IS NOT TO BE DISREGARDED BECAUSE OF ANY SUPPOSED POLICY OF THE GOVERNMENT TO THE CONTRARY, NOR BECAUSE PROSECUTIONS INSTITUTED MUST FAIL.

Northern Securities Co. v. The United States, 193 U. S. 197, 350, 351.

Goodno v. Oshkosh, 31 Wis. 127, 130.

Railway Co. v. Taylor, 52 Wis. 37, 58.

In Northern Securities Co. v. United States, the court said:

> "So long as Congress keeps within the limits of its authority as defined by the Constitution, infringing no rights recognized or secured by that instrument, its regulations of interstate and international commerce, whether founded in wisdom or not must be submitted to by all. Harm and only harm can come from the failure of the courts to recognize this fundamental principle of constitutional construction. To depart from it because of the circumstances of special cases or because the rule in its operation may possibly affect the interests of business, is to endanger the safety and integrity of our institutions and to make the constitution mean not what it says, but what interested parties wish it to mean, at a particular time and under particular circumstances. The supremacy of the law is the foundation rock upon which our institutions rest. * * *
>
> But even if the court shared the gloomy forebodings in which the defendants indulge it could not refuse to respect the action of the legislative branch of the government if what it has done is within the limits of its constitutional power. The suggestions of disaster to business have, we apprehend, their origin in

the zeal of the parties who are opposed to the policy underlying the act of Congress or are interested in the result of this particular case; at any rate the suggestions imply that the court may and ought to refuse the enforcement of the provisions of the act, if in its judgment Congress was not wise in prescribing as a rule by which the conduct of interstate and international commerce is to be governed, that every combination, whatever its form, in restraint of such commerce and the monopolizing or attempting to monopolize such commerce shall be illegal. These plainly are questions as to the policy of the legislation which belong to another department, and this court has no function to supervise such legislation, from the standpoint of wisdom or policy. We need only say that Congress has authority to declare, and by the language of this act as interpreted in prior cases, has in effect declared, that the freedom of interstate and international commerce shall not be obstructed or disturbed by any combination, conspiracy or monoply that will restrain such commerce, by preventing the free operation of competition among interstate carriers engaged in the transportation of passengers or freight. This court cannot disregard that declaration unless Congress, in passing the statute in question, be held to have transgressed the limits prescribed for its action by the Constitution. But, as already indicated, it cannot be so held consistently with the provisions of that instrument."

In Railroad Co. v. Taylor, the court said:

"We have been urged with great ability to give the section such construction as to forever prevent unjust discrimination by the legislature; and grave consequences have been assumed as the result of a different construction. On the other hand we have been urged with equal ability that such a decision would unseat many titles, stop revenue, necessitate a

revision of the laws of taxation and possibly the calling of a constitutional convention. The answer to all this is obvious. It is no part of the duty of the court to make or unmake, but simply to construe this provision of the constitution. All questions of policy, all questions of restriction and unjust discrimination; all questions of flexibility and adjustibility to meet the various wants and necessities of the community must be regarded as having been fully considered and conclusively determined by the adoption of the constitution."

There can be no policy of the government contrary to the enactment of Congress on a subject within its sphere.

Railway Co. v. Phelps, 137 U. S. 528, 536.

Haddon v. Barney, 5 Wall. 107, 111.

United States v. Lee, 106 U. S. 196, 220.

Northern Sec. Co. v. United States, 193 U. S. 197, 350.

Dewey v. United States, 178 U. S. 510, 521.

Webster v. Luther, 163 U. S. 331, 342.

Coffin v. Rich, supra.

Goodno v. Oshkosh, supra.

In **Railway Co. v. Phelps**, the court said:

"But where a statute, as in this case, is clear and free from all ambiguity, we think the letter of it is not to be disregarded in favor of a mere presumption as to what is termed the policy of the government, even though it may be the settled practice of the department."

In **Haddon v. Barney**, the court said:

"What is termed the policy of the government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from

the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes."

In **United States v. Lee**, the court said:

"No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government from the highest to the lowest are the creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man, who by accepting office, participates in its functions, is only the more strongly bound to submit to that supremacy and to observe the limitations which it imposes upon the exercise of the authority which it gives."

In **Dewey v. The United States**, the court said:

"Our province is to declare what the law is, and not under the guise of interpretation, or under the influence of what may be surmised to be the policy of the government, so to depart from sound rules of construction as in effect to adjudge that to be law which Congress has not enacted as such."

In so far as any power, superior to Congress, can declare the policy of the government, the Constitution in the 5th amendment has declared this policy in petitioner's favor.

IV.

THE LEGISLATIVE INTENT OF THE 59TH CONGRESS, AS MANIFESTED IN SECTION 10 OF THE HEPBURN ACT, IS NOT DEFEATED BY SECTION 13 REVISED STATUTES.

Section 13 is:

> "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability."

Judge Lochren, who sat at the hearing of the demurrer to the indictment herein, (Trans. p. 29) said:

> "Section 13 of the Revised Statutes gives a rule of construction only applicable to such repealing statutes as have no express saving clause indicating that such matter was in the mind of Congress when it passed the repealing act, and therefore was not one of the matters then expressly acted upon. Section 10 of the Hepburn act expressly repeals that part of the Elkins act on which these indictments rest, and also contains an express saving clause covering only pending cases. Thus Congress in the Hepburn act expressly provided just what penalties, forfeitures and liabilities should not be extinguished by the repeal, and equally, by the force of the express language used extinguished others. It does this by the express language of the repeal, without resorting to the maxim Expressio unius est exclusio alterius; and it therefore does expressly provide that the effect of the repeal shall be different

> from what it would have been were there no express saving clause and the matter left to the construction required by section 13. It therefore matters not whether the saving clause thus expressed covered only civil causes or causes which are both criminal and civil."

(1) *The 41st Congress in section 13 did not attempt,* by the use of the words "so expressly provide" to fetter future Congresses.

The word "expressly" means only "particularly" or "especially" or "with a distinct purpose or object." Section 13 requires only that the repealing act shall particulary speak to the subject of what shall be saved from the repeal.

In **Magone v. Heller, 150 U. S. 70, 74, 75,** the court said:

> "While the adverb 'expressly' in its primary meaning denotes precision of statement as opposed to ambiguity, implication or inference, and is equivalent to in an express manner, or in direct terms, it is also commonly used to designate purpose and as equivalent to 'especially', or 'particularly', or 'for a distinct purpose or object.' * * *
>
> The result of these considerations is that in this act the phrase 'expressly used for manure' is equivalent to 'used expressly' or 'particularly' or 'especially' for manure, and denotes those substances the only common use of which, either by themselves or in combination with other materials is for the purpose of fertilizing the soil."

Webster's Dictionary defines expressly, "In an express manner," "In direct terms," "With a distinct purpose," "Particularly," as "A book written expressly for the young." And the further

illustration is added from Shakespeare: "I am sent expressly to your lordship."

(2) *One Congress cannot limit a subsequent Congress to the use of any fixed formula to manifest its legislative intent.*

Brown v. Barry, 3 Dall. 365, 367.

Brightman v. Kirner, 22 Wis. 53.

Mongeon v. People, 55 N. Y. 613, 618, 619.

McCann v. City of New York, 52 App. Div. 358, 362.

People v. England, 91 Hun. 152, 155.

State v. Smith, 62 Minn. 540, 542.

Friend v. Levy, 80 N. E. 1036.

Files v. Fuller, 44 Ark. 273, 280.

In Brightman v. Kirner, the court said:

"Now, it is said, there is no purpose expressly set forth in the law of 1854, to repeal, amend or modify these provisions of the city charter; neither is there any reference whatever to them in that law. This is so. But to our minds nothing can be more clear than that the legislature intended the law of 1854 to apply in all respects to the city of Milwaukee as well as to other towns and cities of the state. And where this intention is so plain and manifest, it must prevail. The law cannot be restricted in its operation, if we are satisfied it was designed to apply to Milwaukee, because the legislature has not said in so many words it should repeal all intervening provisions of the charter. A law may be repealed by implication as effectually as in any other manner. It is very obvious that the legislature of 1852 could not limit a succeeding legislature to any certain form in exercising its legislative functions. Indeed we cannot better express our

minds upon this point than by quoting the language of the counsel for the respondent. 'One legislature cannot be bound by the acts of another as to the mode in which it shall exercise its constitutional powers. No clog can be thrown in its way, and no form can be presented for its action which the constitution does not prescribe. If the legislature has the power to pass a law, and does pass it, expressing an intention as to what the rule shall be, courts cannot reject the evident intention because a certain formula of words is not used.' It appears to us that this is a perfectly conclusive answer to the argument that the law of 1854 cannot and does not apply to the city of Milwaukee, because the legislature did not express its intention in a particular manner that the law should apply in all respects to that city."

In **Mongeon v. People**, the court said:

"The legislature could not declare in advance the intent of subsequent legislatures or the effect of subsequent legislation upon existing statutes."

(3) *Section* 13 *is not a constitutional provision. It cannot save itself from repeal.*

The section is no more than a legislative by-law. It is subject to repeal the same as any other law. When a later Congress manifests, with reference to the subject matter of section 13, an intent contrary to the provisions of that section, the intent of the later Congress controls.

Manigault v. Springs, 199 U. S. 473, 487.

Brown v. Barry, 3 Dall. 365, 367.

Files v. Fuller, 44 Ark. 273, 280.

Cortelyou v. Anderson, (N. J.) 63 Atl. 1095, 1097.

Kleckner v. Turk, 63 N. W. 469, 474-475.
Mix v. Railway Co., 116 Ill. 502.

Section 13 was enacted by the 41st Congress as section 4 of the act of February 25, 1871, entitled:

"An act prescribing the form of the enactment and resolving clauses of acts and resolutions of Congress and rules for the construction thereof."

In **Manigault v. Springs**, the court said:

"As this is not a constitutional provision, but a general law enacted by the legislature it may be repealed, amended or disregarded by the legislature which enacted it. This law was doubtless intended as a guide to persons desiring to petition the legislature for special privileges, and it would be a good answer to any petition for the granting of such privileges that the required notice had not been given. But it is not binding upon any subsequent legislature nor does a non-compliance with it impair or nullify the provisions of an act passed without the requirement of such notice."

In **Brown v. Barry**, the court said:

"And the intention of the legislature, when discovered, must prevail, any rule of construction declared by previous acts to the contrary notwithstanding."

In **Files v. Fuller**, the court said:

"This statute has very little importance save in hermeneutics, and has been rarely invoked, for no legislature has power to prescribe to the courts rules of interpretation or to fix for future legislatures any limits of power as to the effect of their action. Any subsequent legislature might make its repealing action operate in pending suits as effectually as if no such statute existed, and the courts are quite free

yet to consider what the subsequent legislature did in fact intend, or had power to do."

In Cortelyou v. Anderson, the court said:

"With respect to repealing acts the rule is crystalized in the third section of the general act relating to statutes, approved March 27, 1874, which declares that the repeal of any statutory provision by this act or by any act thereafter passed is not to affect or impair any act done or right vested or accrued before such repeal shall take effect. But this statute is of course itself subject to repeal and therefore cannot impose a construction upon any act thereafter passed which is contrary to the clear language of the later act."

In Kleckner v. Turk, the court said:

"Moreover, we think the sections of chapter 88, of which section 2 contained the saving clause, which were passed under the following title, "An act concerning the enacting and repeal of statutes," may be styled (and not inaptly) as were some similar provisions in Kansas—a set of quasi-legislative by-laws."

In Mix v. Railway Co., the court said:

"It is hardly necessary to say that it is not competent for the legislature to limit its own legislative powers, even if it should attempt to do so."

(4) *Section* 10 *takes the repeal effected by the Hepburn act out from the operation of section* 13 *and itself prescribes the only rule applicable to that repeal.*

Section 13 prescribes a general rule as to what shall be saved from any and all repeals where the repealing statute is silent on the subject. Section 10 of the Hepburn act prescribes a particular rule

as to what shall be saved from the particular repeal effected by that act. Section 10, therefore, speaks to the subject matter (or at least to a part of the subject matter) of section 13. It prescribes a special rule as to that to which it speaks. It therefore creates an exception to section 13, or effects a partial repeal of it.

Tracy v. Tuffly, 134 U. S. 206.

Bank v. United States, 107 U. S. 445, 450.

United States v. Chase, 135 U. S. 255, 260.

Felt v. Felt, 19 Wis. 208.

Clark v. Baxter (Minn.), 108 N. W. 838, 839.

State v. Showers, 34 Kans. 271.

Kleckner v. Turk (Neb.) 63 N. W. 469, 474.

Files v. Fuller, supra.

Friend v. Levy (Ohio), 80 N. E. 1036.

State v. Smith, 62 Minn. 540.

People v. England, 91 Hun. 152, 155.

Lang v. United States, 133 Fed. 204.

In Tracy v. Tuffly, the court said:

> "And while it is true that repeals by implication are not favored by the courts, it is settled that without express words of repeal a previous statute will be held to be modified by a subsequent one if the latter was plainly intended to cover the whole subject embraced by both, and to prescribe the only rules in respect to that subject that are to govern."

In Bank v. United States, the court said:

> "These provisions, must be deemed therefore to withdraw national banks which have failed from the class of insolvent persons out of whose estates demands of the United States are to be paid in preference to the claims of other creditors. The law of 1797, re-enacted in the

Revised Statutes, giving priority to the demands of the United States against insolvents cannot be applied to demands against those institutions. The provisions of that law and of the national banking law being, as applied to demands against national banks, inconsistent and repugnant, the former law must yield to the latter, and is, to the extent of the repugnancy, superseded by it. The doctrine as to repugnant provisions of different laws is well settled, and has often been stated in decisions of this court. A law embracing an entire subject, dealing with it in all its phases, may thus withdraw the subject from the operation of a general law as effectually as though, as to such subject, the general law were in terms repealed. The question is one respecting the intention of the legislature. And although as a general rule the United States are not bound by the provisions of a law in which they are not expressly mentioned, yet if a particular statute is clearly designed to prescribe the only rules which should govern the subject to which it relates, it will repeal any former one as to that subject. Daviess v. Fairbairn, 3 How. 636; United States v. Tynen, 11 Wall. 88."

In United States v. Chase, the court said:

"It is an old and familiar rule that 'where there is, in the same statute, a particular enactment, and also a general one, which in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment.' Pretty v. Solly, 26 Beavan 510, per Romilly, M. R.; State v. Comm'rs. of Railroad Taxation, 37 N. J. Law 228. This rule applies wherever an act contains general provisions and also special ones upon a subject, which, standing alone, the general provisions would include."

In **Felt v. Felt**, the court said:

> "It is a well settled rule of construction, that specific provisions relating to a particular subject must govern in respect to that subject, as against general provisions in other parts of the law, which might otherwise be broad enough to include it."

In **Clark v. Baxter**, the court said:

> "While repeals by implication are not favored, it is also true that even if the subsequent statute be not repugnant in all its provisions to a prior statute on the same subject, yet if the former was clearly intended to prescribe the only rule which should govern in the case provided for, it repeals the original act by implication."

In **State v. Showers**, the repealing act contained this saving clause:

> "All prosecutions pending at the time of the taking effect of this act shall be continued the same as if this act had not been passed."

There was in force a general saving statute which read:

> "The repeal of a statute * * * does not affect any right accrued, any duty imposed, any penalty incurred nor any proceeding commenced under or by virtue of the statute repealed."

The court said:

> "It seems to be admitted by counsel for the state that the new sec. 7 cannot apply to this case; for to make it apply would render it an *ex post facto* law, unconstitutional and void. It also seems to be admitted by counsel for the state that the saving clause in § 19 of the act of 1885 is not broad enough to cover this case, but includes only 'prosecutions pending at the time of the taking effect' of the act, and there-

fore that if no other saving statute can be found which will save prosecutions like the present, the present prosecution cannot be maintained. The law in all these respects is unquestionably settled to be just as the counsel for the state seem to admit it to be. But counsel for the state claim that the general saving statute found in § 1, Chapter 104 of the general statutes as heretofore quoted, applies to this case and authorizes the present prosecution under the original § 7, although the prosecution was not commenced until after the original § 7 was repealed. But this can hardly be a correct interpretation of the law; for the legislature in absolute terms repealed original § 7, before this prosecution was commenced, saving only such prosecutions as had already been commenced under the original section and were pending at the time the act of 1885 took effect. The question as to what should be repealed and what saved was before the legislature. It had the entire subject matter thereof under consideration and evidently intended to cover the entire ground, and evidently intended nothing should be repealed except what it expressly repealed, that nothing should be saved except what it expressly stated should be saved. It expressly saved some things; therefore it must be inferred that it intended to save no others. Expressio unius est exclusio alterius. The legislature evidently intended that the special saving clause which it enacted in § 19 of the act of 1885 should take the place of all others, so far as prosecutions under original § 7 were concerned, and that in cases where the special saving clause could apply, the general saving statute should have no operation.

It is a well settled rule of construction, that specific provisions relating to a particular subject must govern in respect to that subject, as against general provisions in other parts of the law, which might otherwise be broad enough to include it. (Felt v. Felt, 19 Wis. 196.)

'It is familiar law that a later statute will operate as a repeal of a former, although it contains no express repeal, and even though its provisions are not absolutely repugnant to those of the former, whenever it is obvious that the one was intended as a substitute for the other.' (The State v. Studt, 31 Kas. 245, 246, and cases there cited. See also Rogers v. Watrous, 8 Tex. 62; Kane v. The State, 20 id. 364; Tunstall v. Wormley, 54 id. 476, 480.)

If, however, the saving clause in § 19 of the act of 1885 was not intended by the legislature to cover the entire ground and to be a substitute for the general saving statute, so far as cases like this are concerned, then the saving clause contained in § 19 of the act of 1885 has no office to perform, but is absolutely worthless; for the general saving clause would save all that it saves, and very much more. Such an interpretation of the law as this would violate all proper canons of construction. It would in effect say that the legislature had done the very foolish thing of enacting a saving clause which can have no real operation at all, and can subserve no actual purpose whatever.

'It is a well settled rule, that when any statute is revised, or one act framed from another, some parts being omitted, the parts omitted are not to be revived by construction, but are to be considered as annulled. To hold otherwise would be to impute to the legislature gross carelessness or ignorance; which is altogether inadmissible.' (Ellis v. Paige, 18 Mass. 45.)

To hold, however, that the saving clause in § 19 of the act of 1885 covers the whole ground, and that no prosecutions under original § 7 are saved, except such as it saves, gives force and operation to such saving clause, and no other holding would do so. If no saving clause were in existence, no new suit could be commenced under the old law, and all suits pending under the old law would be abated and become extinguished. (In re Patty, 22 Kas. 477; Abbott v. Commonwealth, 8 Watts. 517; same case 34

Am. Dec. 492; Hartung v. People, 22 N. Y. 95.)

The legislature of course knew all this, for such is well settled law. The legislature also knew of the existence of the general saving clause, and knew that it would have saved not only all pending suits for violations of the old law, but also all suits that might subsequently be commenced. And with this knowledge, the legislature passed a saving clause of its own. From this it appears that the legislature was not only not satisfied with the old prohibitory liquor law, which it sought to amend, but was also not satisfied with the general saving clause that would have saved all rights and remedies of the state under the old law and continued them in force until all prosecutions could have been had that might have been had under the old law. For this reason the legislature amended the old prohibitory liquor law as it did, and enacted the saving clause as it did; and repealed all things in the old law which it did not expressly save. The theory upon which it has been held by this court that the general saving statute is applicable in cases of repeals is, that where the repealing statute is silent as to whether the rights and remedies which had previously accrued under the repealed statute should be saved or not, such silence indicates an intention on the part of the legislature that the general saving statute should be left to operate upon the repeal and to save all such rights and remedies as come within the saving provisions of the general saving statute. (See especially the case of State v. Boyle, 10 Kas. 113.) In the present case, however, the repealing statute is not silent, for it itself contains a saving clause which shows that it was not the intention of the legislature to rely upon the general saving statute."

In **Kleckner v. Turk**, the repealing act included a special saving statute:

"Whereas an emergency exists this act shall take effect from and after its passage and approval, and shall be held and taken to apply in any case now pending or hereafter brought in any court of this state."

There was in force this general statute:

"Whenever a statute shall be repealed such repeal shall in no manner affect pending actions founded thereon nor causes of action not in suit that accrued prior to any such repeal, except as may be provided in such repealing statute."

The court, on page 474, said:

"The legislature have power to pass a general saving statute which shall have the force and effect to save rights and remedies except where the repealing statute itself shows that it was not the intention of the legislature that such rights and remedies should be saved. Though one legislature cannot bind future legislatures and each can make its laws prevail against any that exist and its intention in that regard will be law, yet as all legislatures are presumed to proceed with the knowledge of existing laws, it may properly be deemed to legislate with such provisions of a general nature in view. The general saving clause of our statute would have saved all actions pending under the provisions of the sections repealed or causes of action not in suit that accrued prior to the passage of the repealing act, if it had not been expressed in or clearly shown by the statute of 1891 which repealed sections 136 and 139 that it was not the purpose of the legislature that such pending actions and those accrued but not in suit should be preserved."

In **Friend v. Levy**, the repealing act was:

"That the act entitled 'An act to impose a tax upon the right to succeed to or inherit property' passed April 25th, 1904, 97 Ohio Laws

398-400, be and the same are hereby repealed except as to estates in which the inventory has already been filed at the date of the passage of this act."

The general saving statute was:

"Whenever a statute is repealed or amended such repeal or amendment shall in no manner affect pending actions, prosecutions or proceedings, civil or criminal, and when the repeal or amendment relates to the remedy it shall not affect pending actions, prosecutions or proceedings unless so expressed; nor shall any repeal or amendment affect causes of action, prosecutions or proceeding existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act."

The court, after holding the special saving clause of the repealing act invalid, said:

"Of course, one legislature has no authority to make rules that are binding upon its successor, but the statutory rule evidently was suggested by experience, and from the generality of its adoption undoubtedly it is important, and, in the absence in the repealing statute of any manifestation of a different intention, perhaps a legal presumption arises that the legislature intended it to apply; but if a different intent appears in the repealing statute, effect must be given to that intent, notwithstanding the statutory rule. That the legislature intended that no inheritance tax should be collected after the repeal, is necessarily implied by the exception, and so section 79 does not apply."

In **Lang v. United States** (Circuit Court of Appeals for the Seventh Circuit) the question of the application of section 13 to repeals where the repealing statute spoke to the same subject matter,

was discussed. The repealing statute in question enacted that the repeal should not affect causes "begun" under the repealed law. There were three separate opinions. Judge Baker held that section 13 applied notwithstanding the special saving clause. Judge Jenkins held that section 13 could not apply because of the special saving clause, and that the special saving clause saved only actions pending at the date of the repeal. Judge Grosscup held that the special saving clause controlled, but that it had the same meaning as section 13. He reached this conclusion by construing the word "begun" to mean "now begun or which shall hereafter be begun." A majority of the court, however, were of the opinion that section 13 could not apply where the repealing act itself spoke also as to what should be saved from the repeal.

Judge Jenkins said:

> "This, (section 13) without doubt, prescribes a rule of construction to be applied to every subsequent act, in the absence of an expression of a different intent in such subsequent act. United States v. Reisinger, 128 U. S. 398, 9 Sup. Ct. Rep. 99, 32 L. ed. 480. But as one legislature cannot bind a subsequent legislature to a particular mode of repeal, where the subsequent act contains a provision with reference to a prior act superseded by the new act, we must apply the recognized canons of construction to the language employed to ascertain the intent of the Congress.
>
> By the act of March 3, 1903, c. 1012, 32 Stat. 1214 (U. S. Comp. Stat. Supp. 1903, p. 172) the act of March 3, 1875, c. 141, 18 Stat. 477 (U. S. Comp. St. 1901, p. 1286) was undoubtedly repealed or superseded, and was no longer operative, (U. S. v. Tynen, 78 U. S. 92, 20 L. ed. 153; 32 Stat. 1221, § 36; U. S. Comp. Stat. Supp. 1903, p. 185) unless it remained

in force for the purposes of prosecution for penalties incurred for violation of it by virtue of section 13 of the Revised Statutes. The new act, by section 28 (32 Stat. 1220; U. S. Comp. Stat. Supp. 1903, p. 183) provided:

'That nothing contained in this act shall affect any prosecution or other proceeding, criminal or civil, begun under any existing act, or any acts hereby amended, but such prosecution and other proceeding, criminal or civil, shall proceed as if this act had not been passed.'

What did Congress mean by this provision? If nothing had been said, the old statute might have remained operative for the purpose of punishment of infraction of it, but the present act says that it shall remain in force for the purpose of prosecutions or other proceedings, begun under the act superseded. It limits the life of the superseded act to criminal or civil proceedings begun under that act; and so limited, under recognized canons of construction, it is clear that the Congress did not intend to save prosecutions which had not then been begun. 'Expressio unius est exclusio alterius.' If it were designed to save prosecutions not begun for offenses committed under the superseded act, as well as proceedings then begun, there was no necessity of speaking to the subject at all, for the general statute (Rev. St. § 13, U. S. Comp. St. 1901, p. 61) would have saved all prosecutions.

We are compelled to assume that the Congress understood this. We are compelled to assume that they spoke to a purpose. The natural import of the language used, as with deference, I think, can bear no other construction than that the Congress intended to say what it expressly said should be saved, and nothing else. It is not permitted to the court to say that the Congress spoke inadvisedly or unwisely, nor should violence be done to recognized rules of construction to avoid supposed mischievous results, or supposed careless legislation. 'Ita lex scripta est.' The law has so

spoken. The courts should follow and obey. If injury results the responsibility is upon the legislature, not upon the court.

The case of U. S. v. Reisinger, supra, is relied upon by the government to sustain this prosecution, but is readily distinguishable from the case in hand. There the proviso to the act is to the effect that the rights of parties 'shall not be abridged or affected as to contracts in pending cases,' but there was no proviso with reference to criminal prosecution for offenses committed under the repealed act. The Supreme Court ruled that the question whether the prosecution of offenses was saved was determined by general statute, (Rev. St. § 13, U. S. Comp. St. 1901 p. 6) and because the legislature had not spoken in the new act to the question of offenses committed under the old act evidenced clearly an intention that with respect to that subject the general statute would control. The act saved contracts in pending causes, because there was no general statute of construction which would save them, and rights would have been lost by the repeal except for the proviso.

The court recognized the general rule that the repeal of a penal statute acts as a remission of all penalties for violations of it committed before its repeal, and a release from prosecution therefor after the repeal. The case of State v. Showers, 34 Kas. 269, 8 Pac. 474, is a case on all fours with the one in hand and contains an able and, as I think, conclusive argument in support of the position here assumed.

I fail to be impressed with the subtlety of grammar by which, as I think, the plain meaning of the language employed is distorted and 'prosecution begun' is held to mean a prosecution to be begun. Such interpretation does violence to that canon of construction which requires words of common use to be taken in their natural, plain, obvious and ordinary sig-

nification, and imputes to the Congress a needless use of language, since, if it were designed to save prosecutions thereafter to be begun, it was unnecessary to speak to the subject at all, because in the case of United States v. Reisinger, supra (decided 15 years before the present act, and with which we are bound to assume Congress was familiar) it was ruled that failure to speak to the question clearly indicated the intent that the general statute of construction (Rev. St. § 13; U. S. Comp. St. 1901 p. 6) should govern, and should be read into the act. That would result to save all prosecutions under the former act, begun or to be begun. When, therefore, the Congress by the present act spoke to the subject, and saved prosecutions begun under the former act, the intent is clearly manifested to absolve for all offenses committed under the prior act, prosecutions for which had not then been begun.

The act for which plaintiffs in error were convicted was done under the former act. No prosecution was commenced until after the enactment of the present statute. I think, therefore, that the prosecution cannot be maintained; and upon that ground I am constrained to dissent from the judgment of the court without an expression of opinion upon the other questions considered."

(5) *Section 13 can have no application, where Congress, in a repealing statute, enacts a special saving provision.*

Where a repealing act is silent as to what shall be saved, the legislature is presumed to have intended the general saving statute to govern. There is no room for such presumption where the legislature in the repealing act speaks to the subject. *The expressed excludes any implication from silence.*

State v. Showers, supra.

State v. Smith, 62 Minn. 540, 543.

People v. England, 91 Hun. 152, 155.

McCann v. New York, 52 App. Div. 358, 362.

Town of Wirt v. Supervisors, 90 Hun. 205, 211.

Files v. Fuller, 44 Ark. 273, 280.

Friend v. Levy, 80 N. E. 1036.

In State v. Showers, the court said:

"In the present case, however, the repealing statute is not *silent*, for it itself contains a saving clause, which shows that it was not the intention of the legislature to rely upon the general saving statute."

In State v. Smith, the court said:

"When a repeal is enacted, either directly or by way of amendment, accompanied by no special saving clause, the general and permanent saving clause contained in an existing and prior statute attaches to the repeal or amendment, unless a contrary legislative intent plainly appears from the repealing statute or amendment. Sutherland St. Const., Secs. 167, 226; 23 Am. & Eng. Enc. Law, 437; Wharton v. State, 5 Coldw. 1, 94 Am. Dec. 214, 219; note People v. McNulty, 93 Cal. 427, 29 Pac. 61; U. S. v. Barr, 4 Sawy. 254, Fed. Cas. No. 14,527; Gilleland v. Schuyler, 9 Kan. 569, 581. Laws 1895 c. 219, which is a substitute for Penal Code Sec. 467, under which this prosecution was commenced, manifests no purpose of the legislature to take it out of the operation of the general and permanent saving statute. (G. S. 1894, Sec. 258) and Penal Code Sec. 467 remains in force as to all offenses committed prior to its amendment."

In People v. England, the court said:

"I think the act of 1892 may be properly considered on the question of the intent of the

legislature of 1895 in amending section 41 of the Penal Code. The predecessor of that legislature had in 1892 enacted that the repeal of a statute should not affect the liability to punishment for a crime committed before the repealing act takes effect, but that such crimes might be punished as if the repeal had not been effected. The act of 1892 was not binding upon the legislature of 1895. That legislature could give any repealing act such force and effect as it desired. But in the absence of anything in the statute indicating a contrary intent, I think the legislature in the amendatory act of 1895 should be deemed to have intended that statute to have the force and effect as provided in the rule adopted by it in 1892."

In **McCann v. New York**, the court said:

"It is suggested that the legislature of 1892 had no power to trammel or impair the action of subsequent legislatures, but as was said in the case of People v. England (91 Hun. 155) in considering the effect of this very section of the statutory construction act upon acts passed at sessions of the legislature in subsequent years, 'the legislature, therefore, by the act of 1892, laid down a rule of statutory construction applicable to all future statutes. The act did not attempt to interfere in any manner with future legislation, but simply prescribed a rule of construction applicable when not inconsistent with the general object of the subsequent statute or the context of the language construed or other provision of the repealing law indicating a different intent.' In analyzing the act of 1899 we find no expression of an intent on the part of the legislature to extinguish rights acquired under the act of 1894. When the act of 1899 was passed there stood upon the statute book this general Statutory Construction Law, and it is fair to assume that the act of 1899 was passed with the intent of the legislature that it should be construed in accordance with existing rules of construction as pre-

scribed by statute, and if it had been the intention to affect accrued rights that intention in some way would have been made manifest. As is further said in the case last cited, the act of 1892 was not binding upon subsequent legislatures. They could give any repealing act such force and effect as desired, but in the absence of anything in the statute indicating a contrary intent, the subsequent legislature should be deemed to have intended the statute passed by it to have the force and effect as provided in the rule of construction adopted by the legislature of 1892."

(6) *The rule that an earlier statute covering a particular subject matter is not overthrown by a later statute including in its general terms the particular subject has no application to the case at bar.*

The court below cites in support of its application of this rule:

Wood v. United States, 16 Pet. 342, 362.
United States v. Gear, 3 How. 120, 131.
Frost v. Wenie, 157 U. S. 46, 58.
United States v. Healy, 160 U. S. 136, 146.
Rosencrans v. United States, 165 U. S. 257.
United States v. Greathouse, 166 U. S. 601.
McChord v. Railway Co., 183 U. S. 483, 500.

Wood v. United States and McChord v. Railway Company involved the construction of statutes each general in terms and including matters covered by the other, but not enacted with the same object in view. It was held that the later statutes were cumulative only, and did not repeal the earlier or create exceptions to them.

Rosencrans v. United States involved the construction of statutes the later of which did not speak to

the subject of the earlier, but merely contained language indicating that Congress thought it had spoken to the subject. The reasoning of this court clearly indicates that, if the later statute had spoken to the subject it would have controlled.

United States v. Gear, Frost v. Wenie, United States v. Healy and **United States v. Greathouse**, hold that an earlier statute prescribing a particular rule for a particular situation is not repealed by a later statute couched in general terms broad enough to include the matters covered by the earlier, *where there is no indication of an intent on the part of the legislature to prescribe by the later act an exclusive rule.* In such case the two acts may stand together. The later will include only those cases within its apparent scope, which are not covered by the earlier.

With all deference we submit that the learned Court of Appeals has misconceived the situation in the case at bar. Here the *earlier* statute is *general*, covering the matter of saving from all repeals; the *later* is *particular*, covering only the matter of saving from the particular repeal effected by the act of which it is a part. In such cases the particular statute controls.

(7) *The question here involved was not decided in United States v. Reisinger*, 128 U. S. 398.

In that case the special saving clause involved was:

> "Provided, however, that the rights of the parties shall not be abridged or affected as to contracts in pending cases as provided for in

said act; but such contracts shall be deemed to be and remain in full force and virtue and shall be recognized as contemplated by said act."

The special saving clause involved in the Reisinger case did not speak to the subject matter of section 13.

Section 13 speaks to the saving of *penalties, forfeitures and liabilities incurred under the statute* repealed. The special saving clause involved in the Reisinger case spoke only to the saving of *rights accrued under contracts* previously made. It therefore could not create an exception to section 13, or in any way affect its operation.

The court said:

"It is conceded that, under the general principles of the common law, the repeal of a penal statute operates as a remission of all penalties for violations of it committed before its repeal and a release from prosecution therefor after said repeal, unless there be either a clause in the repealing statute, or a provision of some other statute, expressly authorizing such prosecution. In this case the court is of the opinion that Sec. 13 Rev. Stat. contains such provision. It reads as follows:

'The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute, unless the repealing act shall so expressly provide; and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability.'

This section, we think, clearly excepts offenses committed before the passage of the repealing act of 1884. To show this, it is only

necessary to read the act of 1884 in connection with Sec. 13 Rev. Stat. as one act. It would then read substantially as follows: 'Be it enacted, etc., that the act entitled 'An act relating to claim agents and attorneys in pension cases' approved June 20, 1878, is hereby repealed: Provided, that said repeal shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred thereunder, and that the same shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty or liability.'"

V.

SECTION 13 IS INEFFECTUAL TO PREVENT THE COURTS FROM GIVING EFFECT BY THEIR DECREES TO THE INTENT OF A SUBSEQUENT CONGRESS, AS THAT INTENT MAY BE DISCOVERED FROM THE SUBSEQUENT ENACTMENT.

The judiciary is an independent department. To construe the law is of the essence of its duty.

Ableman v. Booth, 21 How. 506, 520.

Gordon v. United States, 117 U. S. 697.

United States v. Klein, 13 Wall. 128, 147.

Marbury v. Madison, 1 Cranch. 137, 176.

District of Columbia v. Hutton, 143 U. S. 18, 27.

United States v. Claflin, 97 U. S. 546, 548.

Powell v. Pennsylvania, 127 U. S. 678, 697.

Brown v. Barry, supra.

Files v. Fuller, supra.

Brightman v. Kirner, supra.

State v. Showers, supra.

People v. England, supra.

McCann v. New York, supra.

In **Ableman v. Booth**, the court said:

> "This judicial power was justly regarded as indispensable, not merely to maintain the supremacy of the laws of the United States, but also to guard the states from any encroachments upon their reserved rights by the general government. * * * The grant of judicial power is not confined to the administration of laws passed in pursuance to the provisions of the Constitution, nor confined to the interpretation of such laws; but by the very terms of

the grant the Constitution is under their view when any act of Congress is brought before them and it is their duty to declare the law void and refuse to execute it if it is not pursuant to the legislative powers conferred upon Congress."

In **Gordon v. United States**, the court said:

"The existence of this court is therefore as essential to the organization of the government established by the Constitution as the election of a president or members of Congress. It is the tribunal which is ultimately to decide all judicial questions confided to the government of the United States. No appeal is given from its decision nor any power given to the legislative or executive departments to interfere with its judgment or process of execution. Its jurisdiction and powers and duties being defined in the organic law of the government and being all strictly judicial, Congress cannot require or authorize the court to exercise any other jurisdiction or power, or perform any other duty."

In **United States v. Klein**, the court said:

"We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.

It is of vital importance that these powers be kept distinct. The Constitution provides that the judicial power of the United States shall be vested in one supreme court, and such inferior courts as the Congress shall from time to time ordain and establish. The same instrument, in the last clause of the same article, provides that in all cases other than those of original jurisdiction, 'the supreme court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make.'

Congress has already provided that the Supreme Court shall have jurisdiction of the judgments of the Court of Claims on appeal. Can it

prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself."

In **Marbury v. Madison**, the court said:

"It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other the courts must decide on the operation of each. 'So, if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the court must either decide that case, conformable to the law, disregarding the Constitution, or conformable to the Constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.'"

In **District of Columbia v. Hutton**, the court said:

"The question is: was said section 354 repealed by the act of 1878? That is a judicial question to be determined by the courts upon a proper construction of that section and subsequent legislation upon the same subject matter, and is not for the legislative branch of the government to determine."

In **United States v. Claflin**, the court said:

"Whether a statute was repealed by a later one is a judicial, not a legislative, question."

VI.

In conclusion, we submit that nothing in the history of our government indicates a settled policy of relentlessness. Its policy seems rather one of generosity toward its citizens. We believe the 59th Congress intended to continue this policy and has done so.

Wm. R. BEGG,
For Petitioner.

APPENDIX.

INTERSTATE COMMERCE ACT AS IT EXISTED PRIOR TO THE PASSAGE OF THE HEPBURN ACT.

(24 St. at L. 379; 25 St. at L. 855).

Section 6. That every common carrier subject to the provisions of this act shall print and keep open for public inspection schedules showing the rates and fares and charges for *the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its route.* The schedules printed as aforesaid by any such common carrier shall plainly state the places *upon its railroads* between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately *the* terminal charges and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be posted in two public and conspicuous places, in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected.

Any common carrier subject to the provisions of this act receiving freight in the United States to be carried through a foreign country to any place in the United States shall also in like manner print and keep open to public inspection, at every depot or office where such freight is received for shipment, schedules showing the through rates established and charged by such common carriers to all points in the United States beyond the foreign country to which it accepts freight for shipment; and any freight shipped from the United States through a foreign country into the United States, the through rate on which shall not have been made public as required by this act, shall, before it is admitted into the United States from said foreign

country, be subject to customs duty as if said freight were of foreign production; *and any law in conflict with this section is hereby repealed.*

No *advance* shall be made in the rates, fares, and charges which have been *established* and published *as aforesaid* by any common carrier in compliance with the requirements of this section, except after *ten* days *public* notice, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the *increased* rates, fares or charges will go into effect; and the proposed changes shall be shown by printing new schedules, *and* shall be plainly indicated upon the schedules in force at the time and kept open for public inspection. *Reductions in such published rates, fares, or charges shall only be made after three days' previous public notice, to be given in the same manner that notice of an advance in rates must be given.*

And when any such common carrier shall have established and published its rates, fares and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force.

Every common carrier subject to the provisions of this act shall file with the commission hereinafter provided for copies of its schedules of rates, fares, and charges which have been established and published in compliance with the requirements of this section, and shall promptly notify said commission of all changes made in the same. Every such common carrier shall also file with said commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this act to which it may be a party. *And in cases where passengers and freight pass over continuous lines or routes operated by more than one common carrier, and the several common carriers operating such*

lines or routes establish joint tariffs of rates or fares or charges for such continuous lines or routes, copies of such joint tariffs shall also, in like manner, be filed with said commission. Such joint rates, fares, and charges on such continuous lines so filed as aforesaid shall be made public by such common carriers when directed by said commission, in so far as may, in the judgment of the commission, be deemed practicable; and said commission shall from time to time prescribe the measure of publicity which shall be given to such rates, fares and charges or to such part of them as it may deem it practicable for such common carriers to publish, and the places in which they shall be published.

No advance shall be made in joint rates, fares, and charges shown upon joint tariffs except after ten days' notice to the commission, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares or charges will go into effect. No reduction shall be made in joint rates, fares and charges, except after three days' notice, to be given to the commission as is above provided in the case of an advance of joint rates. The commission may make public such proposed advances, or such reductions, in such manner as may, in its judgment, be deemed practicable, and may prescribe from time to time the measure of publicity which common carriers shall give to advances or reductions in joint tariffs.

It shall be unlawful for any common carrier party to any joint tariff, to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of persons or property, or for any services in connection therewith, between any points as to which a joint rate, fare, or charge is named thereon than is specified in the schedule filed with the commission in force at the time.

The commission may determine and prescribe the form in which the schedules required by this section to be kept open to public inspection shall be prepared and arranged, and may change the form from time to time as shall be found expedient.

If any such common carrier shall neglect or refuse to file or publish its schedules or tariffs of rates, fares and charges as provided in this section, or any of the same, such common carrier shall, in addition to other penalties herein prescribed, be subject to a writ of mandamus, to be issued by any circuit court of the United States in the judicial district wherein the principal office of said common carrier is situated, or wherein such offense may be committed, and if such common carrier be a foreign corporation in the judicial circuit wherein such common carrier accepts traffic and has an agent to perform such service, to compel compliance with the aforesaid provisions of this section; and such writ shall issue in the name of the people of the United States, at the relation of the commissioners appointed under the provisions of this act; and the failure to comply with its requirements shall be punishable as and for a contempt; and the said commissioners, as complainants, may also apply, in any such circuit court of the United States, for a writ of injunction against such common carrier, to restrain such common carrier from receiving or transporting property among the several states and territories of the United States, or between the United States and adjacent foreign countries, or between ports of transshipment and of entry, and the several states and territories of the United States, as mentioned in the first section of this act, until such common carrier shall have complied with the aforesaid provisions of this section of this act.

The parts changed by the Hepburn Act are *italicized.*

Section 14. That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall include findings of fact upon which the conclusions of the Commission are based, together with its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured; and such findings so made shall thereafter, in all judicial proceedings, be deemed prima facie evidence as to each and every fact found.

All reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of.

The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be competent evidence of the reports and decisions of the Commission therein contained, in all courts of the United States, and of the several states, without any further proof or authentication thereof. The Commission may also cause to be printed for early distribution its annual reports.

Section 15. That if in any case in which an investigation shall be made by said Commission it shall be made to appear to the satisfaction of the Commission, either by the testimony of witnesses or other evidence, that anything has been done or omitted to be done in violation of the provisions of this act, or of any law cognizable by said Commission, by any common carrier, or that any injury or damages has been sustained by the party or parties complaining, or by other parties aggrieved in consequence of any such violation, it shall be the duty of the Commission to forthwith cause a copy of its reports in respect thereto to be delivered to such common carrier, together with a notice to said common carrier to cease and desist from such violation, or to make reparation for the injury so found to have been done, or both, within a reasonable time, to be specified by the Commission; and if, within the time specified, it shall be made to appear to the Commission that such common carrier has ceased from such violation of law and has made reparation for the injury found to have been done, or compliance with the report and notice of the Commission, or to the satisfaction of the party complaining, a statement to that effect shall be entered of record by the Commission, and the said common carrier shall thereupon be relieved from further liability or penalty for such particular violation of law.

Section 16. That whenever any common carrier, as defined in and subject to the provisions of this act, shall violate, or refuse or neglect to obey or perform any lawful order or requirement of the Commission created by this act, not founded upon a controversy requiring a trial by jury, as provided in the seventh amendment to the Constitution of the United States, it shall be lawful for the Commission or for any company or person interested in such order or requirement, to apply in a summary way, by petition, to the circuit court of the United States sitting in equity in the judicial district in which the common carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience, as the case may be; and the said court shall have power to hear and determine the matter, on such short notice to the common carrier complained of as the court shall deem reasonable; and such notice may be served on such common carrier, his or its officers, agents or servants in such manner as the court shall direct; and said court shall proceed to hear and determine the matter speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity but in such manner as to do justice in the premises; and to this end such court shall have power, if it think fit, to direct and prosecute in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition; and on such hearing the findings of fact in the report of said Commission shall be prima facie evidence of the matters therein stated; and if it be made to appear to such court, on such hearing or on report of any such person or persons, that the lawful order or requirement of said Commission drawn in question has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience of such order or requirement of said Commission, and enjoining

obedience to the same; and in case of any disobedience of any such writ of injunction or other paper process, mandatory or otherwise, it shall be lawful for such court to issue writs of attachment, or any other process of said court incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier, and if a corporation, against one or more of the directors, officers, or agents of the same, or against any owner, lessee, trustee, receiver, or other person failing to obey such writ of injunction, or other proper process, mandatory or otherwise; and said court may, if it shall think fit, make an order directing such common carrier or other person so disobeying such writ of injunction or other proper process, mandatory or otherwise, to pay such sum of money, not exceeding for each carrier or person in default the sum of five hundred dollars for every day, after a day to be named in the order, that such carrier or other person shall fail to obey such injunction or other proper process, mandatory or otherwise; and such moneys shall be payable as the court shall direct, either to the party complaining or into court, to abide the ultimate decision of the court, or into the Treasury; and payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order in the nature of a writ of execution, in like manner as if the same had been recovered by a final decree in personsam in such court. When the sum in dispute shall be of the value of two thousand dollars or more, either party to such proceedings before said court may appeal to the Supreme Court of the United States, under the same regulations now provided by law in respect of security for such appeal; but such appeal shall not operate to stay or supersede the order of the court or the execution of any writ or process thereon; and such court may, in every such matter, order the payment of such costs and counsel fees as shall be deemed reasonable. Whenever any such petition shall be filed or presented by the Commission it shall be the duty of the district attorney, under the direction of the attorney general of the United States, to prosecute

the same; and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

If the matters involved in any such order or requirement of said commission are founded upon a controversy requiring a trial by jury, as provided by the seventh amendment to the Constitution of the United States, and any such common carrier shall violate or refuse or neglect to obey or perform the same, after notice given by said Commission as provided in the fifteenth section of this act, it shall be lawful for any company or person interested in such order or requirement to apply in a summary way by petition to the ~~district~~ circuit court of the United States sitting as a court of law in the judicial district in which the carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience as the case may be; and said court shall by its order then fix a time and place for the trial of said cause, which shall not be less than twenty nor more than forty days from the time said order is made, and it shall be the duty of the marshall of the district in which said proceeding is pending to forthwith serve a copy of said petition and of said order, upon each of the defendants, and it shall be the duty of the defendants to file their answers to said petition within ten days after the service of the same upon them as aforesaid. At the trial the findings of fact of said Commission as set forth in its report shall be prima facie evidence of the matters therein stated, and if either party shall demand a jury or shall omit to waive a jury the court shall, by its order, direct the marshall forthwith to summon a jury to try the cause; but if all the parties shall waive a jury in writing, then the court shall try the issues in said cause and render its judgment thereon. If the subject in dispute shall be of the value of two thousand dollars or more either party may appeal to the Supreme Court of the United States under the same regulations now provided by law in respect to security for such appeal; but such appeal must be taken within twenty days from

the day of the rendition of the judgment of said circuit court. If the judgment of the circuit court shall be in favor of the party complaining he or they shall be entitled to recover a reasonable counsel or attorney's fee, to be fixed by the court, which shall be collected as part of the costs in the case. For the purposes of this act, excepting its penal provisions, the circuit court of the United States shall be deemed to be always in session.*

INTERSTATE COMMERCE ACT AS AMENDED BY THE HEPBURN ACT. (34 ST. AT L. 584-595.)

Sec. 6. (Sec. 2 Hepburn Act.) That every common carrier subject to the provisions of this act shall *file with the Commission created by this act and* print and keep open to public inspection schedules showing *all* the rates, fares, and charges for *transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection, as aforesaid, the separately established rates, fares and charges applied to the through transportation.* The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately *all* terminal charges, *storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed* and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, *or the value of the service rendered to the passenger, shipper or con-*

signee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be *kept* posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. *The provisions of this section shall apply to all traffic, transportation and facilities defined in this act.*

Any common carrier subject to the provisions of this act receiving freight in the United States to be carried through a foreign county to any place in the United States shall also in like manner print and keep open to public inspection, at every depot or office where such freight is received for shipment, schedules showing the through rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment; and any freight shipped from the United States through a foreign country into the United States the through rate on which shall not have been made public, as required by this act, shall, before it is admitted into the United States from said foreign country, be subject to customs duties as if said freight were of foreign production.

No *change* shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been *filed and* published by any common carrier in compliance with the requirements of this section, except after *thirty* days' notice *to the Commission and to the public published as aforesaid,* which shall plainly state the changes proposed to be made in the schedule then in force and the time when the *changed* rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, *or* shall be plainly indicated upon the schedules in force at the time and kept open to public inspection; *Provided, That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting and*

filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions.

The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties.

Every common carrier subject to this act shall also file with said Commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this act to which it may be a party.

The Commission may determine and prescribe the form in which the schedules required by this section to be kept open to public inspection shall be prepared and arranged and may change the form from time to time as shall be found expedient.

No carrier, unless otherwise provided by this act, shall engage or participate in the transportation of passengers or property, as defined in this act, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs: Provided, That wherever the word "carrier" occurs in this act it shall be held to mean "common carrier."

That in time of war or threatened war preference and precedence shall, upon the demand of the President of the United States, be given, over all other traffic, to the transportation of troops and material of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic.

The parts added or substituted by the Hepburn act are italicized.

Sec. 14. (Sec. 3 Hepburn Act) That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made.

All reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of.

The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be competent evidence of the reports and decisions of the Commission therein contained in all courts of the United States and of the several states without any further proof or authentication thereof. The Commission may also cause to be printed for early distribution its annual reports.

Sec. 15. (Sec. 4 Hepburn act.) That the Commission is authorized and empowered, and it shall be its duty, whenever, after full hearing upon a complaint made as provided in section thirteen of this act, or upon complaint of any common carrier, it shall be of the opinion that any of the rates or charges whatsoever, demanded, charged, or collected by any common carrier or carriers subject to the provisions of this act, for the transportation of persons or property as defined in the first section of this act, or that any regulations or practices

whatsoever of such carrier or carriers affecting such rates are unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this act, to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged; and what regulation or practice in respect to such transportation is just, fair and reasonable to be thereafter followed; and to make an order that the carrier shall cease and desist from such violation, to the extent to which the Commission find the same to exist, and shall not thereafter publish, demand or collect any rate or charge for such transportation in excess of the maximum rate or charge so prescribed. All orders of the Commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the Commission, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction. Whenever the carrier or carriers, in obedience to such order of the Commission or otherwise, in respect to joint rates, fares or charges, shall fail to agree among themselves upon the apportionment or division thereof, the Commission may, after hearing, make a supplemental order prescribing the just and reasonable proportion of such joint rate to be received by each carrier party thereto, which order shall take effect as a part of the original order.

The Commission may also, after hearing on a complaint, establish through routes and joint rates as the maximum to be charged, and prescribe the division of such rates as hereinbefore provided, and the terms and conditions under which such through routes shall be operated, when that may be necessary to give effect to any provisions of this act, and the carriers complained of have refused or neglected to voluntarily establish such through routes and joint rates, provided no reasonable or satisfactory

through route exists, and this provision shall apply when one of the connecting carriers is a water line.

If the owner of property transported under this act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefore shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the service so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for in this section.

Sec. 16. (Sec. 5 Hepburn act.) That if, after hearing on a complaint made as provided in section thirteen of this act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

If a carrier does not comply with an order for the payment of money within the time limit in such order, the Complainant, or any person for whose benefit such order was made, may file in the circuit court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such *suit* shall proceed in all respects like other *civil suits* for damages, except that on the trial of such *suit* the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable to costs in the circuit court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of

the suit. All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court within one year from the date of the order, and not after; Provided, that claims accrued prior to the passage of this act may be presented within one year.

In *such suits* all parties in whose favor the commission may have made an award of damages by a single order may be joined as plaintiffs, and all of the carriers parties to such order awarding such damages may be joined as defendants, and *such suit* may be maintained by such joint plaintiffs and against such joint defendants in any district where any one of such joint plaintiffs could maintain *such suit* against any one of such joint defendants; and service of process against any one of such defendants as may not be found in the district where the *suit* is brought may be made in any district where such defendant carrier has its principal operating office. In case of such joint *suit* the recovery, if any, may be by judgment in favor of any of such plaintiffs, against the defendant found to be liable to such plaintiff.

Every order of the Commission shall be forthwith served by mailing to any one of the principal officers or agents of the carrier at his usual place of business, a copy thereof; and the registered mail receipt shall be prima facie evidence of the receipt of such order by the carrier in due course of mail.

The Commission shall be authorized to suspend or modify its order upon such notice and in such manner as it shall deem proper.

It shall be the duty of every common carrier, its agents and employes, to observe and comply with such order so long as the same shall remain in effect.

Any carrier, any officer, representative or agent of a carrier, or any receiver, trustee, lessee or agent or either of them, who knowingly fails or neglects to obey any order made under the provisions of

section fifteen of this act, shall forfeit to the United States the sum of five thousand dollars for each offense. Every distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense.

The *forfeiture* provided for in this act shall be payable into the Treasury of the United States, and shall be recoverable in a *civil suit* in the name of the United States, brought in the district where the carrier has its principal operating office, or in any district through which the road of the carrier runs.

It shall be the duty of the various district attorneys, under the direction of the attorney general of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States. The Commisison may, with the consent of the attorney general, employ special counsel in any proceeding under this act, paying expenses of such employment out of its own appropriation.

If any carrier fails or neglects to obey any order of the Commission, other than for the payment of money while the same is in effect, any party injured thereby, or the Commission in its own name, may apply to the circuit court in the district where such carrier has its principal operating office, or in which the violation or disobedience of such order shall happen, for an enforcement of such order. Such application shall be by petition, which shall state the substance of the order and the respect in which the carrier has failed of obedience, and shall be served upon the carrier in such manner as the court may direct, and the court shall prosecute such inquiries and make such investigations, through such means as it shall deem needful in the ascertainment of the facts at issue or which may arise upon the hearing of such petition. If, upon such hearing as the court may determine to be necessary, it appears that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience to such order by writ of injunction or other proper

process, mandatory or otherwise, to restrain such carrier, its officers, agents or representatives, from further disobedience of such order, or to enjoin upon it, or them, obedience to the same; and in the enforcement of such process the court shall have those powers ordinarily exercised by it in compelling obedience to its writs of injunction and mandamus.

From any action upon such petition an appeal shall lie by either party to the Supreme Court of the United States, and in such court the *case* shall have priority in hearing and determination over *all other causes except criminal causes,* but such appeal shall not vacate or suspend the order appealed from.

The venue of *suits* brought in any of the circuit courts of the United States against the Commission to enjoin, set aside, annul or suspend any order or requirement of the Commission shall be in the district where the carrier against whom such order or requirement may have been made has its principal operating office, and may be brought at any time after such order is promulgated. And if the order or requirement has been made against two or more carriers, then in the district where any one of said carriers has its principal operating office, and if the carrier has its principal operating office in the District of Columbia then the venue shall be in the district where said carrier has its principal office; and jurisdiction to hear and determine *such suits* is hereby vested in such courts. The provisions of 'An act to expedite the hearing and determination of suits in equity and so forth,' approved February eleventh, nineteen hundred and three, shall be, and are hereby, made applicable to all such *suits,* including the hearing on an application for a preliminary injunction, and are also made applicable to any proceeding in equity to enforce any order or requirement of the Commission, or any of the provisions of the act to regulate commerce approved February fourth, eighteen hundred and eighty-seven, and all acts amendatory thereof or supplemental thereto. It shall be the duty of the attorney general in every such *case* to file the certificate

provided for in said expediting act of February eleventh, nineteen hundred and three, as necessary to the application of the provisions thereof, and upon appeal as therein authorized to the Supreme Court of the United States, the *case* shall have in such court priority in hearing and determination *over all other causes except criminal causes:* Provided, That no injunction, interlocutory order or decree suspending or restraining the enforcement of an order of the Commission shall be granted except on hearing after not less than five days' notice to the Commission. An appeal may be taken from any interlocutory order or decree granting or continuing an injunction in any suit, but shall lie only to the Supreme Court of the United States: Provided further, that the appeal must be taken within thirty days from the entry of such order or decree and it shall take precedence in the appellate court over *all other causes,* except *causes of like character and criminal causes.*

The copies of schedules and tariffs of rates, fares and charges, and of all contracts, agreements or arrangements between common carriers, filed with the Commission as herein provided, and the statistics, tables and figures contained in the annual reports of carriers made to the Commission, as required by the provisions of this act, shall be preserved as public records in the custody of the secretary of the Commission, and shall be received as prima facie evidence of what they purport to be for the purpose of investigations by the Commission and in *all judicial proceedings;* and copies of or extracts from any of said schedules, tariffs, contracts, agreements, arrangements, or reports made public records as aforesaid, certified by the secretary under its seal, shall be received in evidence with like effect as the originals.

Sec. 20. (Sec. 7 Hepburn Act) * * * * The Commission may, in its discretion, prescribe the forms of any and all accounts, records and memoranda to be kept by carriers subject to the provisions of this act, including the accounts, records and memoranda of the movement of traffic as well as the

receipts and expenditures of moneys. The Commission shall at all times have access to all accounts, records and memoranda kept by carriers subject to this act and it shall be unlawful for such carriers to keep any other accounts, records or memoranda than those prescribed or approved by the Commission, and it may employ special agents or examiners, who shall have authority under the order of the Commission to inspect and examine any and all accounts, records and memoranda kept by such carriers. This provision shall apply to receivers of carriers and operating trustees.

In case of failure or refusal on the part of any such carrier, receiver or trustee to keep such accounts, records and memoranda on the books and in the manner prescribed by the Commission, or to submit such accounts, records and memoranda as are kept to the inspection of the Commission or any of its authorized agents or examiners, such carrier, receiver or trustee shall forfeit to the United States the sum of five hundred dollars for each such offense, such forfeitures to be recoverable in the same manner as other forfeitures provided for in this act.

Any person who shall wilfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by a carrier, or who shall wilfully destroy, mutilate, alter or by any other means or device falsify the record of any such account, record or memoranda, or who shall wilfully neglect or fail to make full, true and correct entries in such accounts, records or memoranda of all facts and transactions appertaining to the carrier's business, or shall keep any other accounts, records or memoranda than those prescribed or approved by the Commission, shall be deemed guilty of a misdemeanor and shall be subject, upon conviction, to a fine of not less than one thousand dollars nor more than five thousand dollars, or imprisonment for a term of not less than one year nor more than three years, or both such fine and imprisonment.

Any examiner who divulges any fact or information which may come to his knowledge during the course of such examination, except in so far as he

may be directed by the Commission or by a court or judge thereof, shall be subject, upon conviction, to a fine of not more than five thousand dollars, or imprisonment for a term not exceeding two years, or both.

That the circuit and district courts of the United States shall have jurisdiction, upon the application of the attorney general of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of said act to regulate commerce or of any act supplementary thereto or amendatory thereof, by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of said acts, or any of them.

And to carry out and give effect to the provisions of said acts, or any of them, the Commission is hereby authorized to employ special agents or examiners who shall have power to administer oaths, examine witnesses and receive evidence. * * * *

ELKINS LAW OF 1903. (32 ST. AT L. 847.)

Sec. 1. That anything done or omitted to be done by a corporation common carrier, subject to the act to regulate commerce and the acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent or person acting for or employed by such corporation, would constitute a misdemeanor under said acts or under this act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said acts or by this act with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said acts to file and publish the tariffs or rates and charges as required by said acts or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a

fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation, to offer, grant or give, or to solicit, accept or receive any rebate, concession or discrimination in respect to the transportation of any property in interstate commerce or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory *thereto* whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory *thereto*, or whereby any other advantage is given or discrimination is practiced. *Every person or corporation who shall offer, grant, or give or solicit, accept or receive any such rebate, concession or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars. In all convictions occurring after the passage of this act for offenses under said acts to regulate commerce, whether committed before or after the passage of this act, or for offenses under this section, no penalty shall be imposed on the convicted party other than the fine prescribed by law, imprisonment wherever now prescribed as part of the penalty being hereby abolished.* Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another, it may be dealt with, inquired of, tried, determined and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

In construing and enforcing the provisions of this section the act, omission or failure of any officer, agent or other person acting for or employed by any common carrier acting within the scope of his employment shall in every case be also deemed to be the act, omission or failure of such carrier as well

as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the act to regulate commerce or acts amendatory thereto, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents in any prosecution begun under this act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this act.

The parts changed by the Hepburn act are italicized.

ELKINS LAW AS AMENDED BY THE HEPBURN ACT.
(34 ST. AT L. 587.)

SEC. 2. * * * That section one of the act entitled, "An act to further regulate commerce with foreign nations and among the states," approved February nineteenth, nineteen hundred and three, be amended so as to read as follows:

"That anything done or omitted to be done by a corporation common carrier subject to the act to regulate commerce and the acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent or person acting for or employed by such corporation, would constitute a misdemeanor under said acts or under this act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said acts or by this act with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said acts to file and publish the tariffs or rates and charges as required by said acts or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more

than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons or corporation to offer, grant, or give, or to solicit, accept or receive any rebate, concession or discrimination in respect to commerce by any common carrier subject to said act to regulate commerce and the acts amendatory *thereof* whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory *thereof*, or whereby any other advantage is given or discrimination practiced. Every person or corporation, *whether carrier or shipper*, who shall *knowingly* offer, grant, or give, or solicit, accept or receive any such rebate, concession or discrimination shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars: *Provided, that any person, or any officer or director of any corporation subject to the provisions of this act, or the act to regulate commerce and the acts amendatory thereof, or any receiver, trustee, lessee, agent or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term not exceeding two years, or both such fine and imprisonment, in the discretion of the court.* Every such violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another, it may be dealt with, inquired of, tried, determined and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

"In construing and enforcing the provisions of this section, the act, omission or failure of any officer, agent or other person acting for or employed by any common carrier *or shipper*, acting within the scope of his employment, shall in every case be also

deemed to be the act omission or failure of such carrier *or shipper* as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the act to regulate commerce or acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecutions begun under this act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this act.

"*Any person, corporation, or company, who shall deliver property for interstate transportation to any common carrier, subject to the provisions of this Act or for whom as consignor or consignee, any such carrier shall transport property from one State, Territory, or the District of Columbia to any other State, Territory or the District of Columbia, or foreign country, who shall knowingly, by employe, agent, officer or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of mony or any other valuable consideration as a rebate or offset against the regular charges for transportation of such property as fixed by the schedules of rates provided for in this Act, shall in addition to any penalty provided by this Act forfeit to the United States a sum of money three times the amount of money so received or accepted and three times the value of any other consideration so received or accepted, to be ascertained by the trial court; and the Attorney General of the United States is authorized and directed, whenever he has reasonable grounds to believe that any such person, corporation or company has knowingly received or accepted from any such common carrier any sum of money or other valuable consideration as a rebate or offset as aforesaid, to institute in any court of the United States of competent jurisdiction, a civil action to collect the said sum or sums so forfeited as aforesaid; and in the trial of said action all such rebates or other considerations so*

received or accepted for a period of six years prior to the commencement of the action, may be included therein, and the amount recovered shall be three times the total amount of money, or three times the total value of such consideration so received or accepted, or both, as the case may be."

The changes made in the Elkins law are italicized.

HEPBURN BILL IN COMMITTEE OF THE WHOLE OF THE SENATE.

May 11, 1906.

Ordered that Sections one, two, three and four as amended in Committee of the Whole be printed.

Sec. 2. * * * That section one of the Act entitled 'An Act to further regulate commerce with foreign nations and among the states,' approved February nineteenth, nineteen hundred and three, be amended so as to read as follows:

"That anything done or omitted to be done by a corporation common carrier subject to the Act to regulate commerce and the Acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said Acts or under this Act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Acts or by this Act with reference to such persons,, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense; and

it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, or accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereto whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced. Every person or corporation who shall offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars: Provided, that any person, or any officer or director of any corporation subject to the provisions of this Act, or the Act to regulate commerce and the Acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein."

"In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier or shipper, acting within

the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper, as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereto, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act."

That section ten of said Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, be amended by adding thereto the following:

"Any person, corporation, or company who shall deliver property for interstate transportation to any common carrier, subject to the provisions of this Act, or for whom, as consignor or consignee, any such carrier shall transport property from one State, Territory or District of the United States to any other State, Territory or District of the United States or foreign country, who shall knowingly and wilfully, by employe, agent, officer, or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money, or any other valuable consideration, as a rebate or offset against the regular charges for transportation of such property, as fixed by the schedules of rates provided for in this Act, shall be deemed guilty of a fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district where such offense was committed, in addition to any other penalties provided by this Act, be subjected to a fine equal to three times the sum of money so received or accepted, and three times the value of any other consideration so received or accepted, to be ascertained by the trial court; and in the trial for such

offense, all such rebates or other considerations so received or accepted for a period of six years prior to the commencement of the action may be considered, and the said fine shall be three times the total amount of money or three times the total value of such considerations so received or accepted, as the case may be: Provided, That the foregoing penalties shall not apply to rebates or considerations received prior to the passage and approval of this act."

May 17, 1906.

Ordered printed with the amendments made in Committee of the Whole agreed to in the Senate in sections one and two and the first amendment in section four.

Sec. 2. * * * That section one of the Act entitled "An Act to further regulate commerce with foreign nations and among the states," approved February nineteenth, nineteen hundred and three, be amended so as to read as follows:

"That anything done or omitted to be done by a corporation common carrier subject to the Act to regulate commerce and the Acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent or person acting for or employed by such corporation, would constitute a misdemeanor under said Acts or under this Act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Acts or by this Act with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to

solicit, accept or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall knowingly and wilfully offer, grant, or give, or solicit, accept or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars: Provided, That any person, or any officer or director of any corporation subject to the provisions of this Act, or the Act to regulate commerce and the Acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure

of such carrier or shipper, as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act.

Any person, corporation, or company who shall deliver property for interstate transportation to any common carrier, subject to the provisions of this Act, or for whom as consignor or consignee any such carrier shall transport property from one State, Territory or District of the United States to any other State, Territory or District of the United States, or foreign country, who shall knowingly and wilfully, by employe, agent, officer, or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration as a rebate or offset against the regular charges for transportation of such property, as fixed by the schedules of rates provided for in this Act, shall, in addition to any penalty provided by this Act, forfeit to the United States a sum of money three times the amount of money so received or accepted and three times the value of any other consideration so received or accepted, to be ascertained by the trial court; and the Attorney General of the United States is authorized and directed, whenever he has reasonable grounds to believe that any such person, corporation or company has knowingly or wilfully received or accepted from any such common carrier any sum of money or other valuable consideration as a rebate or offset as aforesaid, to institute in any court of the United States of competent jurisdiction a civil action to collect the said sum or sums so forfeited as aforesaid; and in the trial of said action all such rebates or other considerations so

received or accepted for a period of six years prior to the commencement of the action may be included therein, and the amount recovered shall be three times the total amount of money or three times the total value of such consideration so received or accepted, or both, as the case may be: Provided, That the foregoing penalties shall not apply to rebates or considerations received prior to the passage and approval of this Act."

STATE SAVING STATUTES.

ALABAMA.

Sec. 5541, Crim. Code, Alabama.

"No repeal, revision, amendment or alteration of any law shall in any manner *affect any prosecution* for an offense committed under the law so repealed, revised, amended or altered, unless the repealing, revising, amending or altering law shall otherwise expressly provide; but every such prosecution, whether begun before or after the enactment of such repealing, revising, amending or altering law, is governed by the law under which the offense may be committed; but in cases where the penalty for the offense may have been altered, the defendant may elect to take the new penalty, but such election must be made before the case is submitted to the jury; nor shall the prosecution for the recovery of any penalty or the enforcement of any forfeiture be in any manner affected by the repeal of a statute, but such prosecution shall be carried on to final judgment in all respects as if such statute had not been repealed."

ARKANSAS.

Sec. 7798, Kirby's Dig. Stat. 1904.

"Any case, plea, prosecution or proceeding, civil or criminal, pending at the time any statutory provision shall be repealed, *shall not be affected by such repeal*, but the same shall proceed in all re-

spects as if such statutory provision had not been repealed." (Rev. St. ch. 129, § 31.)

CONNECTICUT.

Sec. 4932, Gen. Stat. Conn. 1902.

"Such repeal *shall not impair or affect any act* done or right accruing, accrued or acquired, or any obligation existing on the thirtieth of June, 1902; and all matters, civil or criminal commenced by virtue of the laws so repealed and pending on the first day of July, 1902, may be prosecuted and defended to final effect in the same manner as though made under the laws existing on the thirtieth day of June, 1902, unless it shall be otherwise specially provided by law; but when any punishment, penalty or forfeiture shall have been mitigated by the provisions of the general statutes, such provisions shall apply to any judgment to be pronounced after said repeal."

DELAWARE.

Sec. 5, ch. 134, Laws Del. 1893, p. 993, 1013.

"Sec. 5. The repeal of the acts mentioned in section 2 of this chapter *shall not affect any act* done or any cause of action accruing or accrued or established, or any suit or proceeding had or commenced in any civil case, nor any plea, defense, practice or matter subsisting before the time when such repeal shall take effect; but the proceedings in every such case shall be conformed, when necessary, to the provisions of the Revised Code." * * *

"Sec. 6. No offense committed, and no penalty or forfeiture incurred under any of the acts mentioned and repealed in and by section 2 aforesaid, and before the time when such repeal shall take effect, *shall be affected by the repeal;* except that when any punishment, penalty or forfeiture shall have been mitigated by the provisions of the Revised Code, such provisions may be extended and apply to any judgment to be pronounced after the said repeal."

ILLINOIS.

Vol. 3 Ann. Stat., p. 3837, par. 4.

"No new law shall be construed to repeal a former law, whether such former law is expressly repealed or not, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture or punishment incurred, or any right accrued, or claim arising under the former law, or *in any way whatever to affect* any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued or claim arising before the new law takes effect; save only that the proceedings thereafter shall conform, so far as practicable, to the laws in force at the time of such procedure. * * *"

IOWA.

Sec. 48, p. 120, Iowa Code 1897.

"The repeal of a statute does not revive a statute previously repealed, *nor affect any right* which has accrued, any duty imposed, any penalty incurred, or any proceeding commenced under or by virtue of the statute repealed."

KANSAS.

Sec. 8749 Kans. Stat. 1905.

"The repeal of the acts and parts of acts revised and re-enacted in the general statutes aforesaid or repugnant to the provisions thereof, shall not revive any law heretofore repealed or superseded, nor any office heretofore abolished; *nor shall it affect any act* done or right accruing or accrued or any suit or proceeding in any civil action before the repeal takes effect, but the proceedings therein shall, when necessary, conform to the provisions of the general statutes; nor shall such repeal affect any penalty or forfeiture incurred before it takes effect under any of the laws repealed, except that when a punishment, penalty or forfeiture is mitigated by the provisions of the general statutes, such provisions may be extended to apply to any sentence or judgment pronounced after said repeal; nor shall

such repeal affect any suit or prosecution pending at the time it takes effect, for an offense committed or forfeiture incurred under any of the acts repealed, except that the proceedings therein shall, when necessary, conform to the provisions of the general statutes."

KENTUCKY.

Sec. 465 Ky. Stat. 1903.

"No new law shall be construed to repeal a former law as to any offense committed against the former law, nor as to any act done, any penalty, forfeiture or punishment incurred or any right accrued or claim arising under the former law, or *in any way whatever to affect any such offense* or act so committed or done, or any penalty, forfeiture or punishment so incurred or any right accrued or claim arising before the new law takes effect, save only that the proceedings thereafter had shall conform, so far as practicable, to the laws in force at the time of such proceedings. * * *"

MAINE.

Sec. 5, p. 49 Maine Rev. Stat.

"* * * The repeal of an act or resolve passed after March 4th, 1870, does not revive any statute in force before the act or resolve took effect. The repeal of an act *does not affect any punishment* or forfeiture incurred before the repeal takes effect, or any suit or proceeding pending at the time of the repeal for an offense committed or for recovery of a penalty or forfeiture incurred under the act repealed. Actions pending at the time of the passage or repeal of an act are not affected thereby."

MASSACHUSETTS.

Ch. 226, p. 1914 Rev. Laws Mass. 1902.

§ 4. The repeal of a law by this act *shall not affect any act done*, ratified or confirmed, or any right accrued or established, or any action, suit or proceeding commenced or had in a civil case, before the repeal takes effect, but the proceedings in such

case shall, when necessary, conform to the provisions of the Revised Laws.

§ 5. The repeal of a law by this act *shall not affect any punishment,* penalty or forfeiture incurred under such law, except that any provisions of the Revised Laws by which a punishment, penalty or forfeiture is mitigated may be extended and apply to any judgment pronounced after said repeal.

§ 6. The repeal of a law by this act *shall not affect any action, suit or prosecution* pending at the time of the repeal for an offense committed or for the recovery of a penalty or forfeiture incurred under any of the laws repealed, except that the proceedings therein shall, when necessary, conform to the provisions of the Revised Laws."

MISSOURI.

§ 4180 Rev. Stat. Missouri.

"No offense committed and no fine, penalty or forfeiture incurred previous to the time when any statutory provision shall be repealed, *shall be affected by such repeal;* but the trial and punishment of all such offenses, and the recovery of such fines, penalties and forfeitures, shall be had in all respects as if the provisions had remained in force."

MISSISSIPPI.

Code of 1906. Sec. 5 p. 9.

"An offense committed and a penalty or forfeiture incurred previous to the time when this code shall take effect and an indictment or prosecution for any offense or for the recovery of any penalty or forfeiture pending at the time when this code shall take effect, *shall not be affected by its adoption;* and all such offenses, penalties and forfeitures shall remain subject to the laws in force before this code shall take effect, except that all the proceedings had thereafter shall be conducted according to the provisions thereof. * * *"

MINNESOTA.

Revised Laws 1905.

"Sec. 5512. Whenever a law is repealed which repealed a former law, the former law shall not thereby be revived, unless it is so expressly provided; *nor shall such repeal affect any right accrued*, any duty imposed, any penalty incurred, or any proceeding commenced, under or by virtue of the law repealed."

"Sec. 5506. Such repeal *shall not affect any penalty* or forfeiture previously incurred, except that any provision of the Revised Laws whereby a punishment, penalty or forfeiture is mitigated, may be extended and applied to a judgment pronounced after they take effect; and in actions or prosecutions pending at the time of the repeal, for offenses committed, or for the recovery of penalties or forfeitures incurred, under any of the acts repealed, the subsequent procedure shall conform, so far as practicable, to the Revised Laws."

"Sec. 5505. The repeal by these laws of any act or part thereof, whether the same be revised and re-enacted herein or not, shall not revive any law heretofore or hereby repealed or any office abolished. Neither *shall it affect any* act done, ratified or confirmed, or any right accrued or established, or any action or proceeding had or commenced in a civil cause, before the repeal takes effect; but the proceedings in such case shall conform, so far as practicable, to the provisions of the Revised Laws."

NEBRASKA.

Sec. 6966 Cobbey's Ann. Stat. Nebraska 1903.

"Whenever a statute shall be repealed, such repeal *shall in no manner affect pending actions* founded thereon, nor causes of action not in suit that accrued prior to any such repeal, except as may be provided in such repealing statute."

NEW HAMPSHIRE.

Sec. 6 p. 864 Stat. & Laws N. H. 1901.

"No offense committed, and no penalty or forfeiture incurred under any of the acts hereby repealed and before the time when such repeal shall take effect, *shall be affected by the repeal,* except that when any punishment, penalty or forfeiture shall be mitigated by the provisions of the public statutes such provisions may extend and apply to any judgment to be pronounced after such repeal."

"§ 7. No suit or prosecution pending at the time of such repeal for any offense committed or for the recovery of any penalty or forfeiture incurred under any of the acts hereby repealed, *shall be affected by said repeal,* except that the proceedings in such suit or prosecution shall be conformed when necessary to the provisions of the public statutes."

NEW JERSEY.

§ 28 p. 3194 Vol. 3 Gen. Stat. New Jersey.

"That no offense committed and no liability, penalty, or forfeiture, either civil or criminal, incurred previous to the time when any statutory provision shall be repealed or altered by this act, or by any act hereafter passed, *shall be discharged or affected by the repeal* or alteration of any statute under which such offense, liability, penalty or forfeiture was incurred, unless it be expressly declared in the act of the legislature whereby such repeal or alteration has or shall be made, that offenses, liabilities, penalties or forfeitures already committed or incurred, shall be thereby released and discharged; and indictments and prosecutions for such offenses, liabilities, penalties and forfeitures shall be instituted and be proceeded with in all respects as if such prior statute had not been repealed or altered; except that when such subsequent act of the legislature shall relate to mere matters of practice or mode of procedure, the proceedings had thereafter in the indictment or prosecution for such offenses, liabilities, penalties or forfeitures shall be

in such respects, as far as is practicable, in accordance with the provisions of such subsequent act of the legislature."

NEW YORK.

Sec. 6 Cum. & Gilbert's Gen. Laws &c. N. Y. p. 3843.

"No offense committed, and no penalty or forfeiture incurred previous to the time when any statutory provision shall be repealed, *shall be affected by such repeal;* except that when any punishment, forfeiture or penalty shall have been mitigated by the provisions of the Revised Statutes, such provision shall apply to and control any judgment to be pronounced after the said statutes shall take effect for any offense committed before that time."

NORTH CAROLINA.

Sec. 5455 Revisal of 1905.

No offense committed, and no penalty or forfeiture incurred under any act of the statutes hereby repealed and before the time when such repeal shall take effect, *shall be affected by the repeal."*

OHIO.

§ 79 Vol. 1 Bates' Ann. Ohio Stat. 6th Ed.

"Whenever a statute is repealed or amended such repeal or amendment *shall in no manner affect pending actions,* prosecutions or proceedings, civil or criminal, and when the repeal or amendment relates to the remedy it shall not affect pending actions, prosecutions or proceedings unless so expressed; nor shall any repeal or amendment affect causes of such action, prosecution or proceeding existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act."

RHODE ISLAND.

Ch. 26 Sec. 16 p. 126 Gen. Laws R. I. 1896.

"§ 16. The repeal of any statute *shall in no case affect any act* done or right accrued or established,

or any suit or proceeding had or commenced in any civil cause before the time when such repeal shall take effect.

§ 17. No suit, prosecution or indictment pending at the time of the repeal of any statute for any offense committed or for the recovery of any fine, forfeiture or penalty incurred under the statute so repealed, *shall in any case be affected by such repeal,* but such suit, prosecution or indictment may be proceeded with, and such act shall be deemed to be in force for the purpose of prosecuting the same to final judgment, execution or sentence, as the case may be."

TENNESSEE.

§ 61 (p. 122) Code of Tenn. 1896.

"The repeal of a statute *does not affect any right* which accrued, any duty imposed, any penalty incurred, nor any proceeding commenced under or by virtue of the statute repealed."

TEXAS.

Sayle's Tex. Civ. Stat. Ann. § 6 p. 1903.

"That no offense committed, and no liability, penalty, or forfeiture, either civil or criminal, incurred prior to the time when any statute or part thereof shall be repealed or altered by the Revised Statutes, *shall be discharged or affected by such repeal* or alteration; but prosecutions and suits for such offenses, liabilities, penalties or forfeitures shall be instituted and proceeded with in all respects as if such prior statute or part thereof had not been repealed or altered, except that where the mode of procedure or matters of practice have been changed by the Revised Statutes, the procedure had after the Revised Statutes shall have taken effect, in such prosecution or suit, shall be, as far as practicable, in accordance with the Revised Statutes."

UTAH.

§ 2485 Stat. 1894.

"No offense committed, and no penalty or forfeiture incurred under any statute hereby repealed before the repeal takes effect, *shall be affected by the repeal,* except that when a punishment, penalty or forfeiture is mitigated by the provisions herein contained such provision shall be applied to a judgment to be pronounced after the repeal."

VERMONT.

§ 29 Stat. 1894.

"The repeal of an act shall not revive one which has been repealed, *nor affect an act done,* a right accruing, accrued, acquired or established, nor a suit or proceeding had or commenced in a civil cause before the time when the repeal takes effect; nor shall it affect a suit pending at the time of such repeal for the recovery of a penalty or forfeiture incurred under the act so repealed."

VIRGINIA.

§ 6 Stat. Virg. 1904.

"No new law shall be construed to repeal a former law as to any offense committed against the former law, or as to any act done, any penalty, forfeiture or punishment incurred or any right accrued or claim arising under the former law, *or in any way whatever to affect any such offense* or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued or claim arising before the new law takes effect; save only that the proceedings thereafter had shall conform, so far as practicable, to the laws in force at the time of such proceedings; and if any penalty, forfeiture or punishment be mitigated by any provision of the new law, such provision may, with the consent of the party affected, be applied to any judgment pronounced after the new law takes effect."

WEST VIRGINIA.

§ 4702 W. V. Code 1906.

"Such repeal, except where it is otherwise provided in this act, *shall not affect any act done or forfeiture incurred* or any right established, accrued or accruing before the said first day of April, 1896, or suit or proceedings pending on that day, save only that the proceedings thereafter had shall conform, as far as practicable, to the provisions of the foregoing chapters of this act."

WISCONSIN.

Sec. 4981 Wis. Stat. 1898.

"No offense committed and no penalty or forfeiture incurred previous to the time when any of the acts aforesaid shall be repealed *shall be affected by such repeal*, except that when any punishment, forfeiture or penalty shall have been mitigated by the provisions of these revised statutes, such provisions shall apply to and control any judgment to be pronounced after the said statutes shall take effect for any offense committed before that time."

WYOMING.

Sec. 2713 Rev. Stat. Wyoming 1899.

"All statutes in force when the Revised Statutes of the year 1899 take effect, and which are not included therein or which are not expressly continued in force, shall be and are hereby repealed; Provided, that said repeal shall take effect and be in force from and after said first day of December, A. D. 1899. Provided, further, however, that such repeal *shall not affect any act done* or any *right* accruing or accrued, or any suit or proceeding or prosecution had or commenced in any cause, civil or criminal, before said repeal, but any rights and liabilities under said statutes shall continue and be enforced in the same manner as if the said repeal had not been made, and all offenses committed and all penalties and forfeitures incurred under any statutes hereby repealed may be prosecuted and punished in the same manner and with the same effect as if said repeal had not been made."

CALIFORNIA.

Sec. 329 Kerr's Cyclopedic Codes Cal. 1907.

"The repeal of any law creating a criminal offense does not constitute a bar to the indictment or information and punishment of an act already committed in violation of the law so repealed, unless the intention to bar such indictment or information and punishment is expressly declared in the repealing act."

COLORADO.

Sec. 4189a p. 1199, Vol. 3, Mills' Ann. Codes 1905.

"The repeal, revision, amendment or consolidation of any statute or part of a statute, or section or part of a section, of any statute, shall not have the effect to release, extinguish, alter, modify or change in whole or in part any penalty, forfeiture or liability, either civil or criminal, which shall have been incurred under such statute, unless the repealing, revising, amending or consolidating act shall so expressly provide; and such statute or part of a statute or section or part of a section of a statute so repealed, amended or revised shall be treated and held as still remaining in force for the purpose of sustaining any and all proper actions, suits, proceedings and prosecutions, as well criminal as civil, in the enforcement of such penalty, forfeiture or liability, as well as for the purpose of sustaining any judgment, decree or order which can or may be rendered, entered or made in such actions, suits, proceedings or prosecutions, imposing penalty or declaring such penalty, forfeiture or liability."

FLORIDA.

Sec. 60 Gen. Stat. 1906 (Act Nov. 6, 1829, § 1.)

"All laws and ordinances in force in this state on the 22nd day of July, 1822, be and the same are hereby repealed; Provided, nevertheless, that all causes of action arising under and founded on any

of said laws and ordinances shall be judicially determined according to the principles and rules of said laws and ordinances, anything in these statutes to the contrary notwithstanding."

IDAHO.

Rev. Stat. 1887, § 159, p. 858.

"The repeal of any law creating a criminal offense does not constitute a bar to the indictment and punishing of an act already committed in violation of the law so repealed, unless the intention to bar such indictment and punishment is expressly declared in the repealing act."

INDIANA.

Act. 1877, Spec. Sess. p. 73.

"That whenever an act is repealed, which repealed a former act, such act shall not thereby be revived, unless it shall be so expressly provided. And the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability."

MONTANA.

Tit. IV, Sec. 5182, Subd. 2 Mont. Codes & Stat.

"All offenses committed and all penalties or forfeitures incurred by virtue of any statute embraced in the foregoing repealing provision may be enforced, prosecuted or punished as the case may require, subject to the same limitation, if any, prescribed when such offense was committed or such penalty or forfeiture was incurred."

NORTH DAKOTA.

Sec. 6728 Rev. Codes N. D. 1905.

"The repeal of any statute by the legislative assembly shall not have the effect to release or

extinguish any penalty, forfeiture or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability."

OKLAHOMA.

§ 2815, p. 689, Stat. Okla. 1903.

"The repeal of any statute by the legislative assembly shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute, unless the repealing act shall so expressly provide; and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability."

SOUTH DAKOTA.

§ 2476, Rev. Codes 1903.

"The repeal of any statute by the legislature shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statutes shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability."

IN THE

Supreme Court of the United States

No. 491

GREAT NORTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

THE UNITED STATES,
Defendant in Error.

PETITION OF JOHN S. MILLER AND H. S. PRIEST, FOR LEAVE TO FILE BRIEF OF ARGUMENT AS AMICI CURIAE.

Come now John S. Miller and H. S. Priest, and respectfully represent and show to this Honorable Court,

That on the twenty-seventh day of August, 1906, and within sixty days after the approval of the Hepburn Act, an indictment was returned into the District Court for the Northern Division of the Northern District of Illinois, against Standard Oil Company, a corporation organized and existing under the laws of the State of Indiana, containing 1903 counts, in each of which counts said Standard Oil Company was charged with accepting and receiving a concession on a day mentioned, between September 1, 1902, and March 1, 1905, in respect of the

transportation in interstate commerce of refined oil and divers other products of petroleum. That there is involved here in this case above entitled the question as to the effect of the Hepburn Act of June 29, 1906, upon alleged offenses under Section 1 of the Elkins Act of February 19, 1903, and the same question was presented by the defendant shipper in the case brought as aforesaid in the United States District Court for the Northern District of Illinois, but was overruled and that case resulted after a trial, in a conviction upon 1,462 counts and the imposition upon the defendant in that case of a fine of twenty-nine million two hundred forty thousand dollars ($29,240,000). A writ of error has been sued out from the United States Circuit Court of Appeals for the Seventh Circuit to review that judgment which is now pending and it has been assigned as error, among other things, that the District Court erred in not sustaining the defendant's demurrer to the indictment in that case on the grounds that Section 1 of the Elkins Act of 1903 was repealed by the Hepburn Act of 1906, and the alleged offenses charged in said indictment remitted and extinguished, and that there was no law in force when said indictment was returned under which the same was sustainable.

On the seventh day of January, 1908, it will be suggested to the United States Circuit Court of Appeals for the Seventh Circuit, at the opening of its present session, by the plaintiff in error in said cause pending therein, that the said question which is involved in this said above entitled cause of *Great Northern Railway* v. *United States* is so here involved in said cause now pending and set for argu-

ment in this court, and that said question with respect to alleged offenses charged to have been committed by a shipper in violation of Section 1 of said Elkins Act of 1903 is pending in said cause in said Circuit Court of Appeals, which suggestion will be made with a view that said last named court, if it should determine so to do, may certify said question to this Supreme Court, under Section 6 of the Circuit Court of Appeals Act.

Your petitioners further respectfully represent and show to the court that the case now before this court is that of a carrier, while the case pending as aforesaid in the Circuit Court of Appeals for the Seventh Circuit is that of a shipper. Your petitioners respectfully suggest that a solution of the case now herein pending in this court will be aided by considering the question from the standpoint of a shipper to a discussion of which among other things the brief of argument which your petitioners ask leave of this court at this time to file herein is directed.

Your petitioners submit herewith copies of the brief which they ask leave of this court to file.

WHEREFORE your petitioners pray of this court leave to file their brief of argument herein as *amici curiae*.

And your petitioners will ever pray.

JOHN S. MILLER,
H. S. PRIEST.

STATE OF ILLINOIS, }
COUNTY OF COOK. }

John S. Miller, being first duly sworn, on his oath says that he is the John S. Miller, one of the petitioners in the above and foregoing petition named, that the facts stated in the foregoing petition are true as he verily believes.

JOHN S. MILLER.

Subscribed and sworn to before me this 4th day of January, 1908.

R. E. SCHREIBER,
Notary Public, Cook County, Illinois.

(Seal)

Office Supreme Court, U. S.
FILED
JAN 6 1906
JAMES H. McKENNEY,
Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES

No. [illegible]

[illegible]

IN THE

Supreme Court of the United States

No. 491

GREAT NORTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

THE UNITED STATES,
Defendant in Error.

Brief and Argument in Support of Assignments of Error of Plaintiff in Error.

STATEMENT.

Congress passed an act amendatory of the Interstate Commerce Act, February 19th, 1903 (32 Stat. 847, C. 708), commonly referred to as the "Elkins Act," and will be hereafter so styled.

June 29th, 1906, it passed an act entitled "An Act to annul an Act entitled 'An Act to regulate commerce,' approved February fourth, Eighteen Hundred and eighty-seven, and all Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," which was approved on June 29. This act is commonly known as the Hepburn Act, and will hereafter be so designated.

As appears from its title, the latter act was a comprehensive and complete revision and amendment of all preceding acts upon the subject.

Section 10 of this act provides:

> "That all laws and parts of laws in conflict with the provisions of this Act are hereby repealed, but the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law."

By Section 11 this act was to be effective from its passage; but on the next day, June 30, after the act had been in effect for one day, a joint resolution of the Senate and House was passed by which it was provided that the act shall take effect and be in force sixty days after its approval by the President of the United States.

On November 8th, 1906, an indictment containing fifteen counts was returned by a grand jury of the Fourth Division of the District of Minnesota, against the plaintiff in error, charging that it "did unlawfully grant and give to the said W. P. Devereaux Company, a corporation, as aforesaid, a concession" in interstate shipments of grain, from its published tariff rates.

The offenses charged in the fifteen counts are alleged to have been committed in May, June, July and August of 1905. Therefore it appears the alleged offenses were committed while the Elkins Act was in force and prosecution instituted against the plaintiff in error after it had been repealed and superseded by the Hepburn Act.

Counsel who present this brief beg to inform the

court that on August 27, 1906 (which was within the 60 days after the approval of the Hepburn Act), an indictment was returned in the District Court for the Northern Division of the Northern District of Illinois against the Standard Oil Company of Indiana, containing 1,903 counts, in each of which that company was charged with accepting and receiving a concession on a day mentioned between September 1, 1903, and March 1, 1905, in respect of the transportation in interstate commerce of refined oil and divers other products of petroleum. The question which is involved in the case here at bar, as to the effect of the Hepburn Act of 1906 upon alleged offenses under Section 1 of the Elkins Act of 1903, was presented by the defendant shipper in that case, but was overruled and that case resulted after a trial in a conviction upon 1,462 counts and the imposition of a fine amounting to $29,240,000. A writ of error has been sued out from the United States Circuit Court of Appeals for the Seventh Circuit to review that judgment, which is now pending, and it has been assigned for error, among other things, that the District Court erred in not sustaining the demurrer to the indictment in that case on the grounds that Section 1 of the Elkins Act of 1903 was repealed by the Hepburn Act of 1906 and the alleged offenses charged in said indictment remitted and extinguished, and that there was no law in force when said indictment was returned under which the same was sustainable.

It has been, on this 7th day of January, 1908, suggested to the United States Circuit Court of Appeals in said case at the opening of its present session by the plaintiff in error in said cause pending

therein that the said question which is involved in this said above entitled cause of *Great Northern Railway Company* v. *United States*, is so here involved in said cause now pending and set for argument in this court, and that said question, with respect to alleged offenses charged to have been committed by a shipper in violation of Section 1 of said Elkins Act of 1903, is pending in said cause in said Circuit Court of Appeals, which suggestion was made with a view that said last named court, if it should determine so to do, may certify said question to the Supreme Court under the provision of Section 6 of the Circuit Court of Appeals Act. The question of so certifying said question to this court will, it is believed, be determined by said Circuit Court of Appeals within a few days.

The case now before the court is that of a carrier. The case in the Circuit Court of Appeals for the Seventh Circuit is that of a shipper. It is suggested that a solution of the question involved in the case at bar will be aided by considering the question also from the standpoint of a shipper, as it is presented to said Circuit Court of Appeals in said case in that court; and that this is obvious whether shippers were within the criminal provisions and penalties of the Elkins Act of 1903 (in which case, as will appear, the offense was materially changed and added and the penalties were changed and increased by the later act), or whether shippers were not first brought into the criminal provisions of the Hepburn Act of 1906, as is indicated by the terms of the last paragraph of the provision of the Elkins Act, quoted *infra*, p. 6.., and by the insertion of the words, "or shipper" by the Hepburn Act.

The Elkins Act.

The offense laid in the indictment is confessedly formulated under the provisions of Section 1 of the Elkins Act.

The *first* paragraph of Section 1 of this act makes the carrier as principal equally penally responsible with the agent or officer who, acting for it, does or omits to do anything which would constitute a misdemeanor under its provisions; the *second* makes the "willful failure" of the carrier to file and publish tariffs a misdemeanor; the *third* makes it unlawful for any person to "offer, grant or give, or to solicit, accept or receive any rebate, concession or discrimination" in respect of the transportation of any property in interstate or foreign commerce by any common carrier, subject to said act to regulate commerce and the acts amendatory thereof, whereby any such property shall, by any device whatever, be transported at a less rate than that named in the tariffs, etc.; the *fourth* defines the offense for which the plaintiff in error was indicted, fixes the penalty, repeals all previously established punishments of imprisonment, and fixes the venue. It creates the offense in the following terms:

> "Every person or corporation who shall offer, grant, or give or solicit, accept or receive any such rebates, concession or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars. In all convictions occurring after the passage of this act for offenses under said acts to regulate commerce, whether committed before or after the passage of this act, or for offenses under this

section, no penalty shall be imposed on the convicted party other than the fine prescribed by law, imprisonment wherever now prescribed as part of the penalty being hereby abolished. * * *"

"In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent or other person acting for or employed by any common carrier acting within the scope of his employment shall in every case be deemed to be the act, omission or failure of such carrier as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the act to regulate commerce or acts amendatory thereto, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this act shall be conclusively deemed to be the legal rate, and any departure from such rate or any offer to depart therefrom, shall be deemed to be an offense under this section of this act."

THE HEPBURN ACT.

This act is a comprehensive revision of the original Interstate Commerce Act and its several amendments and includes in its scope many instruments of interstate commerce not previously subject to its terms, such as pipe lines, express companies and sleeping car companies, bridges, terminal facilities and all railroad accessories.

Section *two* of this act is manifestly a substitute for Section 1 of the Elkins Act, *supra*. We quote that part of it which corresponds to Sec. 1 of the Elkins Act, italicizing the language not found in the Elkins Act:

"Every person or corporation, *whether car-*

rier or shipper, who shall, *knowingly*, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars: *Provided, that any person, or any officer or director of any corporation, subject to the provisions of this act, or the act to regulate commerce and the acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.*

* * * * * * * *

"In construing and enforcing the provision of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, *or shipper*, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier *or shipper*, as well as that of the person.

* * * * * * * *

"*Any person, corporation or company who shall deliver property for interstate transportation to any common carrier, subject to the provisions of this act, or for whom as consignor or consignee, any such carrier shall transport property from one state, territory, or District of Columbia, to any other state, territory, or the District of Columbia, or foreign country, who shall knowingly by employe, agent, officer, or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration as a rebate or offset against the regular*

charges for transportation of such property, as fixed by the schedules of rates provided for in this act, shall in addition to any penalty provided by this act, forfeit to the United States, a sum of money three times the amount of money so received or accepted, and three times the value of any other consideration so received or accepted, to be ascertained by the trial court; and the Attorney-General of the United States is authorized and directed, whenever he has reasonable grounds to believe that any such person, corporation or company has knowingly received or accepted from any such common carrier any sum of money or other valuable consideration as a rebate or offset as aforesaid, to institute in any court of the United States of competent jurisdiction, a civil action to collect the said sum or sums so forfeited as aforesaid; and in the trial of said action all such rebates or other considerations so received or accepted for a period of six years prior to the commencement of the action, may be included therein, and the amount recovered shall be three times the total amount of money, or three times the total value of such consideration, so received or accepted, or both, as the case may be."

THE HEPBURN ACT REPEALED SECTION ONE OF THE ELKINS ACT.

A comparison of the foregoing provisions of the Hepburn Act with those of the Elkins Act will disclose the following substantive changes in the Elkins Act:

1st: It is enlarged in scope to embrace many persons and corporations, transactions, and instruments, and aids to interstate commerce not before within the law.

2nd: It either first brings shippers within the criminal provision; or the word "shipper" is specifi-

cally included in the definition of the offense whereas if it was before included it was by construction and inference.

3rd: The word "knowingly" was introduced in the definition of the offense.

4th: The punishment is increased to include imprisonment.

5th: Assuming that shippers were included in the criminal provisions of the Elkins Act in question, the Hepburn Act charges the definitions of the offenses and the conditions or acts constituting them and adds to the offences, in that the acts, omission or failure of his agent or employe are specifically made the acts, omission or failure of the shipper, which the Elkins Act did not do.

6th: It subjects the shipper to an additional penalty of three times the value of rebates or concessions obtained or received.

The changes are radical in the definition and essential conditions of the offense on the part of shippers, the persons who are subject to its penalties and in the punishment of the offense.

The two statutes cannot co-exist. What is an offense under one would not be in the other,—the offender under one would not be an offender under the other, and the punishment under one could not be meted under the other. The latter completely covers the ground of the former and must repeal, revoke, abrogate or supplant it.

The understood and conceded rule is tersely stated by this court in *U. S.* v. *Tynen,* 11 Wall., 88, 92-95, by saying:

> "When there are two acts on the same subject, the rule is to give effect to both, if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first and embraces new provisions plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act."

In the respect under consideration, there is a manifest substantive repugnancy in the definition of the offense and the punishment prescribed between the Elkins Act and the Hepburn Act; and that the whole subject of the former is covered by the latter will be made clearly apparent by a casual comparative reading of the two acts.

Such acts are clearly repugnant where, as here, the later act so changes the punishment for an offense as is done by the Hepburn Act in question. In the *Tynen* case, *supra*, the opinion continues:

> "Now between the provisions of the act of 1813 and the act of 1870 there is a clear repugnancy. The first act makes the punishment for the offenses designated imprisonment or fine. It provides that the punishment shall be one or the other, and in so doing declares that it shall not be both. The second act allows both punishments in the discretion of the court; it thus permits what the first law prohibited.
>
> "Again, the act of 1813 provides that the imprisonment, when imposed as a punishment, shall not be less than three years, and may be extended to five. The act of 1870 allows the imprisonment to be fixed at one year, and from that period upwards to five years. In this also it permits what the first act forbids.

"Again, the act of 1813 declares that the fine, when imposed, shall not be less than five hundred dollars. The act of 1870 allows the fine to be as low as three hundred dollars, thus authorizing what the first act declares shall not be done.

"When repugnant provisions like these exist between two acts, the latter act is held, according to all the authorities, to operate as a repeal of the first act, for the latter expresses the will of the government as to the manner in which the offenses shall be subsequently treated."

All of this applies to the case at bar. Imprisonment is added to the punishment; and in the case of shippers an additional penalty of the forfeiture of three times the amount of money or value of consideration received or accepted as a rebate or offset against transportation charges fixed by the tariffs provided for by the Interstate Commerce Act. In addition to these, as above shown, the offense on the part of the shipper is changed and added to, in that the acts, omissions or failure of his agent are made his acts, omissions or failures.

The same rule with respect to the change in punishment is laid down by Chief Justice Shaw in *Commonwealth* v. *Kimball*, 21 Pick., 373. In that case, the former statute made the punishment of the offense there in question a fine of $20. The later statute provided for a fine of not more than $20 nor less than $10, and "that the provisions of all laws in force inconsistent with this act are hereby repealed." The court says (p. 376):

"These are two statutes passed at different times, covering the present case. Are they inconsistent? The former prohibits the forbidden act, under a penalty of twenty dollars for each offense. The latter prohibits the same act, on

pain of forfeiting not more than twenty dollars, nor less than ten dollars, for each offense. The former is absolute and imperative; the latter allows a latitude of discretion. It appears to the court, that the one is essentially and substantially inconsistent with the other. To illustrate this point, let us suppose that the former statute had imposed a penalty of twenty dollars absolutely, and the latter, one of ten dollars absolutely. The latter statute, by prohibiting the same act under a lower penalty, although no negative words are used, does in effect declare, that it shall not be punished by the higher penalty, and is therefore plainly inconsistent with it. The court are of opinion, that the penalties as they stand in the two acts, are equally inconsistent. The former statute enacts, that the offense shall be punished by a penalty of twenty dollars; the latter declares, that the same offense shall not necessarily be punished by a penalty of twenty dollars, but by such penalty not more than twenty nor less than ten dollars, as the court may direct. The provision of the former, by which the penalty was fixed for this offense, being thus inconsistent with the provisions of the latter, is, by the terms of the latter, repealed. The result may or may not be conformable to the actual intent of those who passed the latter statute. We can only ascertain the legal intent of the legislature, by the language which they have used, applied and expounded conformably to the settled and well known rules of construction. Thus expounded, it appears to us, that the provision of law imposing a penalty upon the act charged in the indictment, by the late statute, is inconsistent with that imposing a penalty in the earlier one; and there being no saving clause, the former is repealed by the latter."

This rule applies as well where the later criminal statute is in the form of an amendment, "so as to read as follows." The case of *Nash* v. *White's Bank*

of Buffalo, 105 N. Y., 243, is closely in point. Section 1 of Chapter 163, of the laws of New York of 1870, authorized a recovery from the bank of double the amount of interest paid to it in excess of 7 per cent. That section was as follows:

> "Section 1. Every Banking Association organized and doing business under and by virtue of the act entitled 'An Act to authorize the business of Banking,' passed April eighteen, eighteen hundred and thirtv-eight, and the various acts supplementary thereto and amendatory thereof, is hereby authorized to take, receive, reserve and charge on every loan or discount made, or upon any note, bill of exchange or other evidences of debt, interest at the rate of seven per cent per annum, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. The knowingly taking, receiving, reserving or charging a rate of interest greater than aforesaid shall be held and adjudged a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon; and in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back twice the amount of the interest thus paid, from the association taking or receiving the same; provided, that such action is commenced within two years from the time the said excess of interest is taken. But the purchase, discount, or sale of a bona fide bill of exchange, note, or other evidence of debt, payable at another place than the place of such purchase, discount or sale, at not more than the current rate of exchange for sight drafts, or a reasonable charge for collecting the same, in addition to the interest, shall not be considered as taking or receiving a greater rate of interest than seven per cent per annum."

On June 4, 1880, an act amending said Section 1 of Chapter 163 of the Laws of 1870, was passed in which it was provided that said Section 1 "is hereby amended so as to read as follows":

> "Sec. 1. Every banking association organized and doing business under and by virtue of the act entitled 'an act to authorize the business of banking,' passed April eighteen, eighteen hundred and thirty-eight, and the various acts supplementary thereto and amendatory thereof, *and every private or individual banker or bankers doing business in this State,* are hereby authorized to take, receive, reserve and charge on every loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at the rate of six per centum per annum, and such interest may be taken in advance, reckoning the days for which the note, bill or other evidence of debt has to run. The knowingly taking, receiving, reserving or charging a rate of interest greater than aforesaid shall be held and adjudged a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon; and, in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back twice the amount of the interest thus paid, from the association taking or receiving the same, provided that such action is commenced within two years from the time the said excess of interest is taken. But the purchase, discount or sale of a *bona fide* bill of exchange, note or other evidence of debt, payable at another place than the place of such purchase, discount or sale, at not more than the current rate of exchange for sight drafts, or a reasonable charge for collecting the same, in addition to the interest, shall not be considered as taking or receiving a greater rate of interest than six per centum per annum."

It will be observed that the changes in the act were the insertion of the words underscored by us in the act of 1880 and the substitution of six for seven per cent as the rate of interest. The suit in question was brought in 1873 to recover penalties alleged to have been incurred under the act of 1870 by defendant in discounting paper at a greater rate of interest than 7 per cent. The question before the Supreme Court was whether the effect of the act of 1880 was to repeal the penalties imposed by the act of 1870. The court held as follows:

> "*Per Curiam.* We are of opinion that the effect of the act of 1880 was to repeal the penalties imposed by Chapter 163 of the Laws of 1870, and that consequently this action, which was brought under the act of 1870, could no longer be maintained, the act of 1880 containing no provision saving pending actions or existing rights of action."

But it is said: The portions of the amended or substituted law which are merely copied without change are not to be considered as repealed, but as continuing in force, by virtue of original enactment.

This may be true in a qualified sense and as applicable to particular statutes and circumstances, but in many cases it may be entirely valueless as a guide to the intention of the legislature. The meaning and effect of words and sentences which are not changed may be entirely changed.

Where in civil cases personal or property rights have arisen under a repealed or modified statute, as in *Steamship* v. *Joliffe*, 2 Wall., 450; *Murdock* v. *Memphis*, 20 Wall., 590; *Bear Lake Company* v. *Garland*, 164 U. S., 1, and *Campbell* v. *California*, 200 U.

S., 87, or where, as in *Holden* v. *Minn.*, 137 U. S., 483, all the substantive parts of the former statute have been re-enacted without modification and uninfluenced by the associated text, the rule above invoked may be applied properly. In the case last referred to it was ruled "that the provisions of an existing statute cannot be regarded as inconsistent with a subsequent act merely because the latter re-enacts or repeats those provisions." If (as in the case of the statute here) the elements of the offense had been changed, and new elements had been added and the punishment had been changed and increased, a re-enactment in part of the language of the definition of the offense as it formerly existed, it would not be questioned that such substantive or elementary change would accomplish a repeal.

This court, in the *Holden* case, distinguished that case from the *Medley* case (134 U. S., 160), by pointing out that the statute in the latter case was intended to "cover the whole subject of the trials and sentences in capital cases, as well as the mode of inflicting the punishment prescribed."

The statute which we have under consideration adds a new element to the offense, increases the punishment and comprehends a large number of persons not embraced in or subject to the Elkins Act, and is accompanied by a provision repealing "all laws and parts of laws in conflict" with it.

It may be said, however, that as to corporations subject to the Elkins prohibition against concessions in rates, the Hepburn Act makes no change in the punishment. This is an exceedingly limited, and, we think, inconsequential view to take of the effect of the Hepburn enactment. It is not true as to

shippers, who, whether corporations or natural persons, are subjected to an additional penalty by the new act, and if the act be a repeal as to shippers and natural persons, it is obviously a repeal as to carriers and corporations.

If it changes the elements of the offense, as it certainly does, and brings in cases as well as persons not before within its prohibition, so that what was not an offense before its passage is an offense, and makes those offenders who could not have given offense under the previous law, and as to all natural persons, increases the punishment, it must be a complete repeal of the former law and a remission of all offenses under it, whatever may be its effect upon a single class of persons. The question is not whether the enforcement of the old law would be unjust, unfair or more or less burdensome upon one person or class of persons; it is whether there has been a revocation of the old law by the new; and if there has been, the remission of all offenses follows, unless otherwise saved, as a legal sequence of the repeal.

SECTION TEN OF THE HEPBURN ACT AND SECTION THIRTEEN OF GENERAL STATUTES (16 Stat. L., 431), CONCERNING EFFECT OF REPEALS.

The tenth section of the Hepburn Act comprises a repeal of all conflicting laws and a clause saving from the effect of the repeal, causes *"now pending in courts of the United States."*

Literally it is as follows:

> "That all laws and parts of laws in conflict with the provisions of this Act, are hereby repealed, but the amendments herein provided for

> shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law."

This enactment evidences the presence of two thoughts in the mind of Congress—the repeal of inconsistent laws and the effect the repeal should have upon previous violations of the repealed law.

That Congress meant to repeal all inconsistent laws and that they should cease to be effective for the purpose of creating thereafter any offense, must be conceded. Naturally, subjectively and textually associated with this thought was the extent to which the repealing act would affect previous violations of the repealed laws. It manifestly did consider this question. Congress had the power to give complete, partial or no amnesty to all offenses under the old law. Whatever it did was the complete and full expression of its will. Its intention must be discovered by what it said when it had the subject in mind, for it must be presumed that it deliberately surveyed the entire field, past and prospective, of the subject under consideration. It is presumed to know the law as it then stood and the effect of its complete enactment upon it.

It provided only that "causes" then "pending" should survive the repeal, but these again are made special in providing that only causes then "pending in courts of the United States." This demonstrates a detailed and specific consideration to the subject.

It was not a careless or hasty utterance; it was thoughtful and specific. It was speaking affirmatively as to what should survive the repeal. When it

specified that certain causes should survive, it clearly meant to express the negative, that all other causes should perish with the act repealed, and that nothing else should be saved. A "cause now pending" is synonymous with a "case" now pending. (*Blyew* v. *U. S.*, 13 Wall., 581, 595.) It is "a suit or action; any question, civil or criminal, contested before a court of justice."

Bouvier Law Dict., title "Cause."
Taylor v. *U. S.*, 45 Fed. R., 531, 539.

But the government contends that Section 13 of the Revised Statutes is to be taken by implication as a part of the repealing statute, and as saving all causes, whether pending at the time of the repeal or begun thereafter. That section is as follows:

> "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability."

Now, in the first place, it is obvious that if Section 13 were to have any operation here, then the saving clause of Section 10 of the Hepburn Act would be useless, because any cause pending in the courts of the United States under the interstate commerce acts would be for the enforcement of a "liability." A "liability" is defined to be the state of being bound or obliged in law or justice to do, pay or make good something which may be enforced by action; legal responsibility.

Bouvier Law Dict., title, "Liability."
Black's Law Dict.
White v. *Green*, 105 Iowa, 176, 181.
Benge's Adm. v. *Bowling*, 106 Ky., 575.

So all causes pending are included within actions for the enforcement of a liability within the meaning of Section 13.

The rule of the common law is that where the repealing statute contains no saving clause, is silent as to the effect of the repeal, the legislature will be presumed to have intended that all proceedings under the act repealed which have not passed into final judgment shall fall with it.

At most, this rule of construction is changed by Section 13, and the *presumption* reversed, where the repealing statute is silent as to the effect of the repeal or does not manifest a different intent.

Now, however, as much as when the common law rule was in force, it is the function of the court to ascertain the intent and the purpose of the legislature which enacted the very law which is before the court, and to ascertain that intent and purpose, if possible, from the language used by that legislature.

And such an intention is clearly expressed by the Amendatory Act in its provision "that all laws and parts of laws in conflict with the provisions of this act are hereby repealed, *but* the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law."

The Congress did not stop with a simple repeal, and leave the effect of the repeal as to past acts and

transactions to be determined by any rule of construction whatever, statutory or common law, but did themselves define and determine the effect of the repeal, an effect different from that resulting from either the statutory or common law rule of construction.

The government seeks to give to Section 13 a force which it does not and cannot be made to possess. It deals with it, not as a rule of construction to be resorted to when the act under consideration does not furnish its own sufficient guides to its meaning, but as if it were actually and textually incorporated in the repealing act as an express part of its terms. To do this is to enable the members of one legislature to bind the members of a subsequent body. But each Congress or General Assembly, within its constitutional limitations, is supreme alike as to the form and substance of its enactments. A legislative act requiring all repeals to be made in express terms would not bind a subsequent legislature, and if there was a repeal by implication, it must be given effect. Repugnant acts cannot stand together, and the later must prevail. And so it is and must be as to the effect of repeals. The later act may not be emasculated of its full force and meaning by anything said or done by a previous legislative body. All this is fully conceded in the opinion of the Circuit Court of Appeals in the following well settled propositions:

> "First, Congress cannot thus limit or restrict the manner in which its power shall be exerted, or its intention manifested, in the future (Cooley's Const. Lim. (7th Ed., 174; Bishop St. Cr. (3rd Ed.), Sec. 147; 2 Sutherland St. Con. (2d Ed.), Sec. 355; *Bloomer* v. *Stolley*, 3 Fed.

> Cas., 129, No. 1559; *Manigault* v. *Springs*, 199 U. S., 473, 487; 26 Sup. Ct., 127; 50 L. Ed., 274; *Kellogg* v. *Oshkosh*, 14 Wis., 623, 628; *Brightman* v. *Kirner*, 22 Wis., 54, 60; *Friend* v. *Levy* (Ohio), 80 N. E., 1036; *Wall* v. *State*, 23 Ind., 150, 153; *Davidson* v. *Witthaus*, 106 App. Div., N. Y., 182, 185; 94 N. Y. Supp., 428; *State* v. *County Court*, 37 W. Va., 808, 811; 17 S. E., 379; *Gilleland* v. *Schuyler*, 9 Kan., 569, 580); second, the intention of the legislature constitutes the law, and may be as effectually manifested by what is necessarily implied as by what is expressed (*Telegraph Co.* v. *Eyser*, 19 Wall., 419, 427; 22 L. Ed., 43; *Ex parte Yarbrough*, 110 U. S., 651, 658; 4 Sup. Ct., 152; 28 L. Ed., 274; *Mchency* v. *Alford*, 168 U. S., 654, 672; 18 Sup. Ct., 242; 42 L. Ed., 614); and, third, where there are conflicting manifestations of the legislative will, the last is controlling, even though it rests in necessary implication."

There is no serious difficulty presented by this case when the purpose of a general saving clause in the general statutes of a state is considered, that it simply reverses the *presumption* as to the legislative intent in case of silence, indulged by the common law.

Nowhere has the significance of this clause been better stated than in *Files* v. *Fuller*, 44 Ark., 273, l. c., 280:

> "This statute has very little importance save in hermeneutics, and has been rarely invoked, for no legislature has power to prescribe to the courts rules of interpretation, or to fix for future legislatures any limits of power as to the effect of their action. Any subsequent legislature might make its repealing action operate in pending suits, as effectually as if no such statute existed, and the courts are quite free yet to consider what the subsequent legislature did

in fact intend, or had power to do. Still it has kept its place on the statute books, and it is persuasive, at least, that subsequent legislatures meant to keep in harmony with it, and in their legislation supposed it would go without saying, that when a repeal was made, all rights in suits pending under the old statutes would be preserved."

See also

People v. *England*, 91 Hun, 152.

And Sutherland in his Statutory Construction, Lewis Ed., Sec. 355, says:

> "*When a repeal is enacted, accompanied by no provision specially for existing rights* which would be affected by it, it should be assumed that they are to have, and were intended to have, such protection as other statutes will give them. *In such cases* the repealing act is to be considered in the same manner and to the same extent as if it contained the saving clause provided by the general law."

Now, as much as before Section 13 was enacted, and no more so, the final question is what did the legislature intend as to the effect of the repeal, and if the legislature has not left that to the presumption, whether of statutory or common law, but has spoken on the subject, then what it has said is the best guide to its meaning and purpose.

And the natural as well as the legal presumption is that if it has spoken on the subject at all it has expressed its full purpose and has not left that to be gathered in part from what it has said, and in part from presumptions which arise only out of silence.

> "Where a statute enumerates the persons or things to be affected by its provisions, there is an implied exclusion of others; there is then a

> natural inference that its application is not intended to be general. * * * When a statute specifies the effect of a certain provision, courts will presume that all the effects intended by the lawmaker are stated. * * * When a revisory act prescribed its operation upon a previous act, it will have no other effect."
>
> Sutherland on Statutory Cons., Lewis' Ed., Sec. 493.
>
> *Perkins* v. *Thorn*, 10 Cal., 189.

The Circuit Court of Appeals for the Eighth Circuit had to deal with the question of statutory construction in *Johnson* v. *Southern Pacific Co.*, 117 Fed. Rep., 462, and Sanborn, C. J., said therein:

> "The primary rule for the interpretation of a statute or a contract is to ascertain, if possible, and enforce the intention which the legislative body that enacted the law, or the parties who made the agreement have expressed therein. But it is the intention expressed in the law, or contract, and that only, that the courts may give effect to. * * * *The legal presumption is that the legislative body expressed its intention; that it intended what it expressed, and that it intended nothing more.* * * * The familiar rule that the expression of one thing is the exclusion of other points to the same conclusion. * * * Where the statute enumerates the persons, things or acts affected by it, there is an implied exclusion of all others."

Presumptions based on silence have no force when something has been said. The intention is then gathered from the spoken word, and not inferred from the unspoken.

It is a rule of statutory construction that an act which revises the whole subject-matter of an earlier

act repeals that earlier act, even as to provisions not repugnant to those of the revising enactment. But this rule applies only when those who enact the later law are silent as to its effect upon previous legislation.

In the case at bar, the legislature has not been silent as to the effect of the repealing act, and has said in express terms that "the amendments herein provided for *shall not affect causes now pending* in courts of the United States but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law."

This is especially true where, as here, they were dealing with a particular subject, and where all they said had reference to that subject, while the thing imputed to them by presumption, and which they did not say, is general in its application.

> "It is a well settled rule of construction, that where there are two provisions, one of which is general and designed to apply to cases generally, and the other is particular and relating to one subject, the particular provision must prevail, and must be treated as an exception to the general provision."
>
> *People* v. *Kipley*, 171 Ill., 44, l. c. 84.

And so it is held in *U. S.* v. *Chase*, 135 U. S., 260, that:

> "It is an old and familiar rule that 'where there is, in the same statute, a particular enactment, and also a general one, which in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect such cases within its general language as are not within the provisions of the particular language.' *Pretty* v.

> *Solly,* 26 Beavan, 610, per Romilly, M. R.; *State* v. *Comm'rs of Railroad Taxation,* 37 N. J. Law, 228. This rule applies wherever an act contains general provisions and also special ones upon the subject, which, standing alone, the general provisions would include."

The applicability of this rule is even more obvious where the general provisions are contained in other laws previously passed by a preceding legislature.

In *Felt* v. *Felt,* 19 Wis., 196, the court said:

> "It is a well settled rule of construction, that specific provisions relating to a particular subject must govern in respect to that subject, as against general provisions in other parts of the law, which might otherwise be broad enough to include it."

In *Raleigh, etc., R. R.* v. *Reid,* 13 Wall., 270, it is said:

> "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."

In *United States* v. *Tynen,* above cited, the court held that where an act provided that the punishment of an offense shall be imprisonment or fine, the act, "in so doing, declared that it shall not be both," and that where the later act allowed both punishments, "it thus permits what the first law prohibits." (11 Wall., 92-93.)

This principle is expressed in the maxim, *expressio unius est exclusio alterius;* and this, said the Supreme Court in *United States* v. *Arredondo,* 6 Pet., 725, "is an universal *maxim* in the construction of statutes;" and as the court, in *Coast-Line*

Ry. v. *Savannah*, 30 Fed. R., 649, said, "is never more applicable than when applied to the interpretation of a statute."

This negation and exclusion of the unexpressed by the expression of that which is to be unaffected and saved, is not an inference, but is *in the terms of the act and positive.*

The case of *Ex parte McCardle*, 7 Wall., 506, 513-14, is a strong authority that the action of Congress in releasing and extinguishing the penalties and liabilities under the Elkins Act which were not saved by Section 10 of the Hepburn Act, was positive, direct and express and not by inference. In that case the Supreme Court (following *Durousseau* v. *United States*, 6 Cranch., 307), held that the appellate jurisdiction of that court was not derived from Acts of Congress. That it was, strictly speaking, conferred by the Constitution, but as it was "with such exceptions and under such regulations as Congress shall make," the affirmative description of its jurisdiction, in an Act of Congress passed in the exercise of such power to make "exceptions" to the constitutional grant of jurisdiction, implied a negation of any jurisdiction not within such description. But the court further held—*and this has strong application to the case at bar*—that where an Act of Congress, so describing a jurisdiction of the Supreme Court of appeals in *habeas corpus* cases, was repealed, this repealing act was held to constitute the making by Congress, *not by inference, but in terms*, of such an "exception" to the constitutional grant of jurisdiction. The court said:

> "The exception to appellate jurisdiction in the case before us, however, is not an inference

> from the affirmation of other appellate jurisdiction. It is made in terms. The provision of the Act of 1867, affirming the appellate jurisdiction of this court in cases of *habeas corpus* is expressly repealed. It is hardly possible to imagine a plainer instance of positive exception." (7 Wall., 513-14.)

So here Section 1 of the Elkins Act, under which alone these alleged offenses existed, being in conflict with the Hepburn Act, is expressly repealed by Section 10 of the latter act; and when so repealed, under the general rule, is to "be considered except as to transactions past and closed, as if it never existed." *Ex parte McCardle, supra* (7 Wall., 514). Section 10, however, provides that said Act "shall not affect causes now pending in courts of the United States." By this express provision the exclusion from the saving provision of all penalties and liabilities except only those in causes pending, is "in terms" and "positive."

The cases cited were dealing with different provisions of the same act, and if in such cases distinctive effect is to be given to the particular provision, and the general clause is to be limited by it, then *a fortiori,* must this be so when the general clause is not contained in the Act under consideration, but was enacted years before as a part of the general body of laws to serve as a mere canon of construction.

In *Courtelyou* v. *Anderson* (N. J.), 63 Atlantic, 1095, a statute provided for the improvement of public roads and for the assessment of benefits against abutting land owners. Proceedings had been begun under this statute and the improvements had been

made and paid for by the county, and the county was proposing to assess benefits against the abutting land owners. Meanwhile, the statute had been repealed and a new law enacted, which contained no provision for the assessment of benefits.

The repealing clause of the new act declared:

> "All acts and parts of acts inconsistent with the provisions of this act be and the same are hereby repealed; provided that this repealer shall not revive any act heretofore repealed, nor shall any proceeding for improvement of any public road, entered into before the passage of this act, abate, but such proceedings shall continue, as near as may be, as if the same had been commenced hereunder."

The third section of the General Act relative to the statutes of New Jersey provided that "the repeal of any statutory provision by this act, or by any other act thereafter passed, is not to affect or impair any act done or right vested or accrued before such repeal shall take effect." It was insisted that this general savings clause saved the right to assess benefits under the old Improvement Act, but the court said:

> "This statute (the general savings statute) is, of course, itself subject to repeal, and therefore cannot impose a construction upon any act thereafter passed which is contrary to the clear language of the later act."

Where the repealing statute is silent as to the effect of the repeal, the general savings clause is operative. Where the repealer speaks as to the effect it shall have, what it says is determinative.

A case meeting and matching every phase of this case is *State* v. *Showers*, 34 Kansas, 269.

Kansas, in the year 1861, enacted a law prohibiting the sale of intoxicating liquors as a beverage, and regulating the sale of such liquors for certain permitted purposes. It was a comprehensive plan of temperance legislation. In 1885 this law was amended and revised, the amendment dealing in a plenary way with the whole subject matter of the law. Sections of the old law, amended and revised, were repealed in express terms. The new law was in every way more drastic than the old. There was no amelioration in its terms as to the definitions of offenses. Whatever was an offense under the old law was an offense under the new one as well, and was subject to more severe punishment. There was no room for presumption from the general tenor of the new law that amnesty was intended for offenders under the old. There was no opportunity for the anomaly of a prosecution and punishment in 1885 for an act done in 1884, which, in 1885, might be done with impunity. All the changes were in the way of defining more offenses, prescribing severer penalties and providing summary and more efficient procedure.

The General Statutes of Kansas contained a savings clause provision as follows:

> "Sec. 1. In the construction of the statutes of this state the following rules should be observed, unless such construction would be inconsistent with the manifest intent of the legislature, or repugnant to the context of the statute: first, the repeal of a statute does not revive a statute previously repealed, nor does such re-

> peal affect any right which accrued, any duty imposed, any penalty incurred, nor any proceeding commenced under or by virtue of the statute repealed. The provisions of any statute, so far as they are the same as those of any prior statute, shall be construed as a continuation of such provisions, and not as a new enactment."

The repealing clause of the act of 1885 was as follows:

> "Sec. 19. Original Sections 2, 3, 4, 7, 8, 9, 12, 13 and 21 of the said act to which this act is amendatory and supplemental are hereby repealed. All prosecutions pending at the time of the taking effect of this act shall be continued the same as if this act had not been passed."

Showers was indicted for a violation of the law of 1881, after it had been repealed, and the contention of the parties was, as here, by the State that in determining the effect of the repeal, the general savings clause was to be read into the statute, and by the defendant that the effect of the repeal was to be determined alone by the saving clause of the repealing act. The court said:

> "The counsel for the State claim that the general saving statute found in Section 1, Chapter 104, of the General Statutes as heretofore quoted, applies to this case and authorizes the present prosecution under the original Section 7, although the prosecution was not commenced until after the original Section 7 was repealed. But this can hardly be a correct interpretation of the law; for the Legislature in absolute terms repealed original Section 7, before this prosecution was commenced, saving only such prosecutions as had already been commenced under the original section, and were

pending at the time the Act of 1885 took effect. The question as to what should be repealed and what saved was before the Legislature. It had the entire subject-matter thereof under consideration, and evidently intended to cover the entire ground; and evidently intended that nothing should be repealed except what it expressly stated should be saved. It expressly saved some things; therefore it must be inferred that it intended to save no others. *Expressio unius est exclusio alterius.* The Legislature evidently intended that the special saving clause which it enacted in Section 19 of the Act of 1885 should take the place of all others, so far as prosecutions under original Section 7 were concerned; and that in cases where the special saving clause could apply, the general saving statute should have no operation.

"'It is a well settled rule of construction that specific provisions relating to a particular subject must govern in respect to that subject, as against general provisions in other parts of the law, which might otherwise be broad enough to include it.' (*Felt* v. *Felt*, 19 Wis., 196.)

"'It is a familiar law that a later statute will operate as a repeal of a former, though it contains no express repeal, and even though its provisions are not absolutely repugnant to those of the former, whenever it is obvious that the one was intended as a substitute for the other.' (*The State ex rel.* v. *Studt*, 31 Kas., 245, 246, and cases there cited. See, also, *Rogers* v. *Watrous*, 8 Tex., 62; *Kane* v. *The State*, 20 *id.*, 364; *Tunstall* v. *Wormley*, 54 *id.*, 476, 480.)

"If, however, the saving clause of Section 19 of the Act of 1885 was not intended by the Legislature to cover the entire ground, and to be a substitute for the general saving statute, so far as cases like this are concerned, then the saving clause contained in Section 19 of the Act of 1885, has no office to perform, but is absolutely worthless; for the general saving clause

would save all that it saves, and very much more. Such an interpretation of the law as this would violate all proper canons of construction. It would in effect say that the Legislature had done the very foolish thing of enacting a saving clause which can have no real operation at all, and can subserve no actual purpose whatever.

"'It is a well settled rule that when any statute is revised, or one act framed from another, some parts being omitted, the parts omitted are not to be revived by construction, but are to be considered as annulled. To hold otherwise would be to impute to the Legislature gross carelessness or ignorance; which is altogether inadmissible.' (*Ellis* v. *Paige*, 18 Mass., 45.)

"To hold, however, that the saving clause in Section 19 of the Act of 1885, covers the whole ground, and that no prosecutions under original Section 7 are saved, except such as it saves, gives force and operation to such saving clause, and no other holding would do so. If no saving clause were in existence, no new suit could be commenced under the old law and all suits pending under the old law would be abated and become extinguished. (*In re Petty*, 22 Kas., 477; *Abbott* v. *Commonwealth*, 8 Watts, 517; *Hartung* v. *The People*, 22 N. Y., 95.)

"The Legislature of course knew all this, for such is well settled law. The Legislature also knew of the existence of the general saving clause and knew that it would have saved not only all pending suits for violations of the old law, but also all suits that might subsequently be commenced. And with this knowledge the Legislature passed a saving clause of its own. From this it appears that the Legislature was not only not satisfied with the old prohibitory liquor law, which it sought to amend, but was also not satisfied with the general saving clause that would have saved all rights and remedies of the state under the old law and continued them in force until all prosecutions could have been had that might have been had under the old law.

For this reason the Legislature amended the old prohibitory liquor law as it did and enacted the saving clause as it did; and repealed all things in the old law which it did not expressly save. The theory upon which it has been held by this court, that the general saving statute is applicable in cases of repeals, is, that where the repealing statute is *silent* as to whether the rights and remedies which had previously accrued under the repealed statute should be saved or not, such silence indicates an intention on the part of the Legislature that the general saving statute should be left to operate upon the repeal and to save all such rights and remedies as come within the saving provisions of the general saving statute. (See especially, the case of *The State* v. *Boyle*, 10 Kas., 113.) In the present case, however, the repealing statute is not *silent*, for it itself contains a saving clause which shows that it was not the intention of the Legislature to rely upon the general saving statute.

"For the reasons above stated, we think the present action cannot be maintained."

The question here is not as to whether the special saving clause of section ten can be given some purpose and operation without extinguishing the liabilities under the Elkins Act here in question. The question is, what does it include in the term "causes now pending in courts of the United States?" As we have above shown, an indictment under the Elkins Act pending in a court is a *cause* pending in that court A cause is "a suit or action; any question, civil or criminal, contested before a court of justice." (Bouvier Law Dict., *Taylor* v. *United States*, 45 Fed. Rep., 531, 539.) It is synonymous with "case." (*Blye* v. *United States*, 13 Wall., 581, 595.) Obviously, if a pending indictment brought in a court

of the United States is a "cause now pending" in a court of the United States, then it would be saved by Section ten of the Hepburn Act. By that same token, no violations of the Elkins Act would be saved unless informations or indictments, *i. e.*, causes, were then pending.

Again, as we have above shown, unless Congress intended by Section ten of the Hepburn Act to limit the saving of offenses under the Elkins Act to those then pending in the United States courts, then the saving clause of Section ten is useless, because everything that it does would have been done by Section thirteen. It could not have been intended merely to save procedure because the procedure would have been saved without the expressed words. (Endlich Interp. Stat., Sec. 487.)

Again, saving clauses saving penalties from the effect of repeal are to receive the same strict construction which a penal statute receives. (*Aaron* v. *State*, 40 Ala., 307, 312.) On the other hand, provisions of law which amount to an amnesty or a wiping out of penalties for alleged offenses, are favored and to be construed liberally. (*State* v. *Shelton*, 65 N. C., 294, 297.) To exclude, by implication, the words "causes now pending" in the saving clause of Section ten, prosecutions of indictments under the Elkins Act, which are plainly included in the express language used, would infringe the rule that a criminal statute is not to be extended by intendment. (*Todd* v. *United States*, 158 U. S., 282.)

And in no other way than to hold that all offenses under the Elkins Act were abrogated except where causes were pending, can effect be given to the saving clause of the Hepburn Act. That act

creates new offenses and prescribes new penalties, but it provides no new procedure for offenses, either new or old. It may as to some civil causes, warrant their expeditious trial, and that could be accomplished without the act, by the exercise of the discretion of the courts in which such causes were pending. But take the act according to its terms, and we measure its full intent and purpose as to the past by the words which it addresses to that past that "the amendments herein provided for shall not *affect causes now pending* in courts of the United States, but *such causes* shall be prosecuted to a conclusion in the manner heretofore provided by law." And as the law was written, in nothing extending it, and in nothing contracting, it should be applied.

Respectfully submitted.

JOHN S. MILLER and
H. S. PRIEST,
Amici Curiae.

In the Supreme Court of the United States.

OCTOBER TERM, 1907.

GREAT NORTHERN RAILWAY COMPANY, PETITIONER,

v.

THE UNITED STATES.

QUESTIONS OF LAW PRESENTED.

This case presents two questions of statutory construction with respect to certain provisions of what is known as "The Hepburn Act," approved June 29, 1906, sometimes referred to as "The Railroad Rate Law" (34 Stats., 584).

PRINCIPAL QUESTION.

The first and principal question to be considered is what interpretation should be given to section 10 of the Hepburn Act, which section reads as follows:

> Sec. 10. That all laws and parts of laws in conflict with the provisions of this act are hereby repealed, but the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a ~~final~~ conclusion in the manner heretofore provided by law.

PETITIONER'S CONTENTION.

> "We contend that it clearly appears from section 10 of the Hepburn Act that Congress intended to and did remit penalties incurred under the Elkins Act prior to June 29, 1906, for which prosecutions were not pending on that date." (Brief of petitioner for writ of certiorari, p. 25.)

THE GOVERNMENT'S CONTENTION.

The Government contends that the concluding portion of section 10 of the Hepburn Act was intended by Congress *to preserve existing methods of procedure* with respect to causes pending in courts of the United States at the time of the passage of the act, and that it should not be construed *as extinguishing penalties, forfeitures, and liabilities* which had accrued under the old law but were not then before the courts for judicial determination.

SECOND QUESTION.

The second and subordinate proposition of law to be considered presents the question as to whether acts of *corporate carriers* and corporate shippers in *knowingly* giving or receiving rebates are within both the original and the amended definitions of those offenses.

THE GOVERNMENT'S CONTENTION.

The Government contends that the acts of corporate carriers in *knowingly* offering, granting, or giving, and

acts of corporate shippers in *knowingly* soliciting, accepting, and receiving rebates, concessions, or discriminations, are within both the original and the amended definition of the offense, inasmuch as the punishment for the commission of such offenses was not changed by the new law. *As to such offenses the old law was not abrogated or repealed, but preserved and continued.*

It appears from the record in this case that the concessions described in the several counts of the indictment were *knowingly* given to the W. P. Devereux Company *by the direction and with the consent of the defendant, the Great Northern Railway Company.* (Rec., p. 54.)

ORDER OF ARGUMENT.

If we are able to demonstrate to the satisfaction of this court that Congress did not intend, by using the language contained in section 10 of the Hepburn Act, to release or extinguish any penalty, forfeiture, or liability which had accrued under the prior law, it will be unnecessary for this court to consider our second proposition.

In the event, however, that our second proposition is reached, we maintain that the prior law, so far as it prohibited *corporate carriers* and *corporate shippers* from *knowingly* giving or receiving rebates, concessions, and discriminations, was not abrogated or repealed by the Hepburn Act, but was preserved and continued in full force and effect.

I.

Section 13, Revised Statutes, forbids the implication sought to be made in this case.

It is contended by petitioner that sections 2 and 10 of the Hepburn Act repealed section 1 of what is known as the Elkins Law (32 Stats., 847) so as to forbid the prosecution, after the Hepburn Act became a law, of one who had committed an offense against the Elkins Law prior to the later act's enactment and had not been indicted therefor.

The material provisions of section 1 of the Elkins Law as it stood prior to the passage of the Hepburn Act are as follows:

> * * * It shall be unlawful for any person, persons, or corporation to offer, grant or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereto whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced. Every person or corporation who shall offer, grant, or give or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be

punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars. *In all convictions occurring after the passage of this act for offenses under said acts to regulate commerce, whether committed before or after the passage of this act, or for offenses under this section, no penalty shall be imposed on the convicted party other then the fine prescribed by law, imprisonment wherever now prescribed as part of the penalty being hereby abolished.* Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

In construing and enforcing the provisions of this section the act, omission, or failure of any officer, agent, or other person acting for, or employed by any common carrier acting within the scope of his employment shall in every case be also deemed to be the act, omission, or failure of such carrier, as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the act to regulate commerce, or acts amendatory thereto, or participates in any rates so filed or published, that rate as against such

> carrier, its officers, or agents in any prosecution begun under this act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this act.

Section 2 of the Hepburn Act declares, *inter alia*, that the foregoing section of the Elkins Law "shall be amended so as to read as follows:"

> * * * It shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier as is required by said act to regulate commerce and the acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, *whether carrier or shipper*, who shall *knowingly* offer, grant, or give, or solicit, accept, or receive any such rebate, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars: *Provided, That any person, or any officer or director of any corporation subject to the provisions of this act, or the act to regulate*

commerce and the acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, *or shipper*, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier *or shipper* as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the act to regulate commerce or acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this

act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this act. (34 Stat., 587).

The portions of each statute not included in the other are italicized.

In the opinion of the Circuit Court (151 Fed. Rep., 88) the repugnancy between the two statutes is thus stated:

> It will thus be noticed that by the Hepburn Law section 1 of the Elkins Law was amended by inserting after the words "every person or corporation," in the clause declaring the parties guilty of a misdemeanor, the words "whether carrier or shipper," and also by inserting in said clause, after the words "who shall" the word "knowingly;" by striking out the clause providing that no penalty shall be imposed other than a fine, and inserting in lieu thereof the proviso, in substance, that any person, or any officer or director of any corporation subject to the provisions of the act, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, shall, in addition to the fine, be liable to imprisonment in the penitentiary for a term not exceeding two years, or both such fine and imprisonment, in the discretion of the court; and by inserting after the word "carrier," in the two instances in which said word appears in the second paragraph, the words "or shipper."

Section 10 of the Hepburn Act provides:

> SEC. 10. That all laws and parts of laws in conflict with the provisions of this act are hereby repealed, but the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law.

Section 13, Revised Statutes, is as follows:

> SEC. 13. The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

Section 13, Revised Statutes, constitutes section 4 of the act approved February 25, 1871 (16 Stats., 431), which is entitled "An act prescribing the form of the enacting and resolving clauses of acts and resolutions of Congress, and rules for the construction thereof." Of this act section 1 contains sections 7, 8, 9, and 10, Revised Statutes; section 2 of the same act contains, with slight verbal changes, section 1, Revised Statutes; section 3 is substantially identical with section 12, Revised Statutes; so that all the provisions of the first title of the Revised Statutes are contained in the act of 1871, with the exception

of sections 2 to 6, inclusive, and section 11. As stated in its original title, section 13, Revised Statutes, is therefore a law "prescribing rules *for the construction* of acts and resolutions of Congress."

In passing upon a law of the same character, and couched in very nearly the same language, the Supreme Judicial Court of Massachusetts, speaking through Chief Justice Gray, afterwards Mr. Justice Gray, of this court, says: "The general rules so established *are to be deemed part of every repealing statute* since passed as much as if expressly inserted therein, unless the later statute clearly manifests a different intention." This principle was adopted and acted upon by this court in the case of the *United States* v. *Reisinger* (128 U. S., 398), in which Mr. Justice Lamar, delivering the opinion, says, in substance, that to determine the effect of the repeal therein considered we must read the repealing clause and United States Revised Statutes, section 13, "as one act;" which he proceeds to do. (128 U. S., 401).

If we deal with section 10 of the Hepburn Act and section 13, Revised Statutes, as Mr. Justice Gray says should be done, as Mr. Justice Lamar did in fact, and as was also done by the Circuit Court in this case (151 Fed. Rep., 84), the two provisions combined will read as follows: "That all laws and parts of laws in conflict with the provisions of this act are hereby repealed, but this repeal shall not have the effect to release or extinguish any penalty, forfeiture,

or liability incurred under said laws, and such laws shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability, but the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law."

This reading is also supported by the decisions in *United States* v. *Barr* (4 Sawyer, 254), in which the modification of the earlier statute was the same as the most material of those presented in the present case, namely, the requirement of guilty knowledge by the later enactment; in *United States* v. *Ulrici* (3 Dillon, 532), in which Mr. Justice Miller explained the scope and purpose of section 13, Revised Statutes; in *United States* v. *Four Cases of Lastings* (10 Benedict, 371); and in *Sims* v. *United States* (121 Fed. Rep., 515), there being, so far as counsel for the United States are aware, no determination to the contrary by any Federal court.

A totally different question was presented in *Manigault* v. *Springs*, (199 U. S., 473.) In that case it was claimed that an act of the South Carolina legislature was void because, although passed in accordance with all the requirements of the constitution of that State, it omitted certain requisites prescribed by a previous act of the same legislature. With respect

to the earlier statute in that case, this court, speaking through Mr. Justice Brown, says: "As this is not a constitutional provision, but a general law enacted by the legislature, it may be repealed, amended, or disregarded by the legislature which enacted it." There can be no doubt that any of the provisions contained in section 1 of the act approved February 25, 1871, now sections 7 to 10, inclusive, of the Revised Statutes, might be disregarded by the Congress without in anywise affecting the validity of its act or resolution; it is equally indisputable that section 13, Revised Statutes, may be repealed or amended, or its operation suspended, whenever the Congress shall see fit; but, in the absence of any expression of legislative intent to the contrary, it constitutes, as is pointed out by Mr. Justice Gray and Mr. Justice Lamar, a "part of every repealing statute since passed as much as if expressly inserted therein."

By a memorandum appended to the report of this case in the Circuit Court (151 Fed. Rep., 100) it appears that Judge Lochren, who was present during the argument of the case but took no part in the decision, seems to have thought that section 13, Revised Statutes, did not form part of section 10 of the Hepburn Act, because of the proviso: "But the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law."

It will be of course remembered that the present was not "a cause now pending in a court of the United States" at the time of the passage of the Hepburn Act. The argument is that *because* the Congress provided expressly for *such* causes it *impliedly* directed that the terms of section 13, Revised Statutes, should not apply to any other "causes" arising under the Elkins Act. In other words, the suggestion is made that in this case the application of section 13, Revised Statutes, is prevented by the rule *expressio unius est exclusio alterius*, a rule of construction by *implication*.

It would be difficult to add much to what is said on this subject in the opinion of the Circuit Court (151 Fed. Rep., pp. 98, 99, 100). We submit that there is no repugnancy whatever between the proviso to section 10 and section 13, Revised Statutes. As shown above, the two can be read together, and, so read, constitute a reasonable and intelligible expression of the legislative will. If such be the case, then we can not say, in the language of Mr. Justice Gray, that "the later statute clearly manifests a different intention" from the purpose that the section establishing the rule of construction shall be considered a part of itself. In the Massachusetts statute he was called upon to construe, the language was: "Unless such construction would be repugnant to the express terms of the same statute," and his words just quoted had reference to this provision. In section 13, Revised Statutes, the words

are: "Unless the repealing act shall so *expressly* provide." There can be, it is respectfully submitted, no question that nothing in section 10 of the Hepburn Act *expressly* provides that penalties or forfeitures already incurred shall not be enforced. To the counsel for the Government it seems nearly as clear that this section does not so provide by any reasonable implication, but, even if the last proposition does not commend itself to this court, we respectfully submit that, in the absence of any *express* provision to the contrary in the repealing statute, under the foregoing authorities (and others which might be cited) section 13, Revised Statutes, becomes incorporated with section 10 and thus excludes all possibility of any release of penalties, forfeitures, etc., by mere *implication*.

Points showing that the intention of Congress was to save the modes of procedure with respect to pending causes rather than such causes themselves.

It is contended by counsel for the petitioner that the language contained in section 10 of the rate law, which reads: "But the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law," clearly indicates a purpose on the part of Congress to save causes pending in the courts of the United States from *release* or *extinguishment*, from which it is argued that all other causes which were

not thus expressly saved are by implication forever barred from future prosecution.

In our opinion the fallacy underlying this proposition consists in confusing the several purposes which a saving clause may be employed to subserve. While saving clauses usually follow the repealing provision of the statute in which they are found, and are generally designed to preserve, either in whole or in part, from extinguishment the penalties, forfeitures, and liabilities which had accrued under the old law, it is perfectly obvious that they may be employed for quite a different purpose and with no idea of preserving from extinguishment penalties, forfeitures, and liabilities—as, for example, the saving, either in whole or in part, of methods of procedure. It is therefore of the utmost importance to ascertain, if possible, in each case as it arises the precise character of the particular saving clause under consideration.

The following points are submitted as establishing beyond all controversy that the special saving clause contained in section 10 of the new rate law was designed by the Congress which enacted it to preserve old methods of procedure with respect to causes then pending in the courts of the United States, and that the only implication to be drawn from the language employed is that all causes then pending before the Interstate Commerce Commission, together with all rights of action not then initiated under the old law, shall be proceeded with in accordance with the modified procedure provided for by the new law.

(1) The History of the Times.

At the time of the enactment of the Hepburn Law and for several months prior thereto, the executive department of the Government had been actively engaged in the prosecution of common carriers and shippers for violations of section 1 of the Elkins Act commonly known as "rebating." Between the 1st day of July, 1905, and the 1st day of June, 1906, about forty indictments had been returned in various judicial districts against both carriers and shippers under that act. During the investigations preliminary to the findings of such indictments disclosures were made which challenged the attention of the entire country, and which established beyond all controversy that the "pernicious practice" of rebating had not been discontinued, but had become quite general throughout the entire country. The revelations incident to such investigations and to the prosecutions which immediately followed in all probability had a great deal to do with influencing Congress in the enactment of some more "drastic" legislation for the purpose of putting a stop to such practices.

The debates in Congress while this law was under consideration were perhaps the most notable in recent years, especially in the Senate, and it is worthy of note that at no time was the idea expressed or even suggested that penalties, forfeitures, and liabilities which had accrued under the old law, but which were not pending before the courts for determination, should be extinguished. Neither was it

intimated that the old law forbidding rebating was considered or thought to be harsh or unjust in any particular. On the contrary, the one dominating idea seems to have been that the old law should be strengthened, and that at least, with respect to individuals offending against that law, the court should be empowered to punish by imprisonment in addition to the imposition of a fine.

Upon this point Judge Morris, of Minnesota, in overruling the demurrer to the indictment in the case at bar, said:

> But if we were permitted, in the face of section 13, to ascertain the intention of Congress by interpretation or inference, and for that purpose could look, if necessary, to the history of the legislation and of the times in which it was passed, as in that case I think we could (*U. S.* v. *Union Pac. R. R. Co.*, 91 U. S., 72; 23 L. Ed., 224), it might be well for us, while we are considering, in the light of that history, what Congress intended to do; also to consider, in the light of that history, what Congress did not intend to do. I think that to anyone at all familiar with that history it is well known that Congress, at the time of the passage of the Hepburn law, was seeking to enlarge and make more effective the powers of the Interstate Commerce Commission, and was seeking not to make the laws in reference to rates and rebates and concessions less stringent, but more stringent, and was seeking, above all things, to prevent the Interstate Commerce Commission from being sheared

> of its powers and the objects of the law nullified by proceedings in court and the necessary delays incident thereto. I think that to anyone at all familiar with the condition of the public mind or with the temper of Congress at that time it must be evident that Congress did not wish to release anyone from the penalties of the laws theretofore in force, but, on the contrary, intended that all offenders against those laws should be prosecuted and that no guilty person or corporation should escape. And I can conceive of no reason why Congress should wish or intend that those whose violations had been discovered and against whom prosecutions had already been commenced, even though they might be few in number, should be prosecuted to a conclusion and should suffer the penalties incurred and that that much larger class of offenders whose violations of the law had not been discovered and against whom prosecutions had not been begun should be allowed to go free. (151 Fed. Rep., 97.)

(2) The Hepburn Law Considered in its Entirety.

When we consider the Hepburn Act as a whole we shall seek in vain for any expression which is susceptible of being construed as indicating dissatisfaction with the old law on the ground of its being "unjust and harsh" in its operation. Counsel for the petitioner recognize the importance of demonstrating, if possible, that Congress regarded the old

law as "harsh and unjust," from which point of vantage they could reason with considerable plausibility that as to all penalties, forfeitures, and liabilities which had accrued, but which had not yet been brought before the courts, it was the purpose of Congress to bar their future prosecution. We submit, however, that no language, either express or implied, can be found in the entire act which will support in the slightest degree such a suggestion. The new rate law is thus described by Circuit Judge Van Devanter in his opinion in the Circuit Court of Appeals:

> That act fills 12 pages of the Statutes at Large and comprises 11 sections. Its purpose is that of perfecting the existing law regulatory of interstate commerce, and this is done by eliminating or changing old provisions deemed unsatisfactory, and by adding supplementary or auxiliary provisions intended to give greater strength and efficiency to the law. These changes all fall within the general category of amendments, but they differ widely in subject and operation. Some operate to repeal portions of the prior law imposing penalties, forfeitures, or liabilities, and therefore come within the explicit terms of the general saving clause (Rev. Stat., sec. 13). Others have more immediate relation to proceedings in the courts of the United States; and still others have immediate relation to proceedings before the Interstate Commerce Commission. Within the first class is the partial repeal of section 1 of the Elkins Act,

resulting from the insertion of the word "knowingly;" within the second are several of the changes in section 16 of the interstate-commerce act (act Feb. 4, 1887, c. 104, 24 Stat., 384; U. S. Comp. St., 1901, p. 3165), notably those relating to the procedure in the Circuit Courts upon petitions for the enforcement of orders of the Interstate Commerce Commission and that removing the pecuniary limitation upon the right of appeal to the Supreme Court in such cases; and within the third are the change in section 14, some of the changes in section 15, and the change in the opening paragraph of section 16. (155 Fed. Rep., 945, 963; Rec., p. 87.)

(3) THE AMENDMENTS TO THE ELKINS LAW SHOW THAT CONGRESS DID NOT REGARD THE PRIOR LAW AS SUFFICIENTLY DRASTIC.

The material amendments to the Elkins Law which are contained in the second section of the Hepburn Act are two in number. We will refer to these in the order of their importance.

(*a*) *The imprisonment feature of the punishment permitted to be imposed upon individual offenders.*

So impressed was Congress with the necessity of putting a stop to this "iniquitous practice" of rebating, that it determined to change the entire character of the offense, at least so far as individual offenders were concerned, by making rebating an infamous crime. This was accomplished by authorizing the courts to sentence individuals who should offend

against the law to imprisonment in the penitentiary for a period of not more than two years. The punishment, however, with respect to corporations, whether carrier or shipper, was left identically the same as it was under the old law, viz, a fine of not less than $1,000 nor more than $20,000 for each offense.

(*b*) *The amendment inserting the word "knowingly."*

In making so radical an amendment to the old law it very naturally occurred to Congress that no person who should thereafter be charged with an offense of this character should be convicted unless it was alleged in the indictment and proven upon the trial that the rebate or concession was granted or received "knowingly." Upon this point Judge Morris, in his opinion in the court below, said:

> I have not been impressed by the argument drawn from the history of the legislation in reference to rates, rebates, and concessions. In that argument it was asserted that those laws were an evolution and that the Hepburn Law was the final result of that evolution. It was asserted that the laws prior to the Hepburn Law had been permitted to remain a dead letter upon the statute book. It was asserted that the Elkins Law was a harsh and stringent law, subjecting those who had given or accepted rebates or concessions, not knowing that they were giving or accepting such rebates or concessions, to its penalties, and that Congress, recognizing this, amended and superseded that law by the Hepburn Law; that by inserting the word "knowingly" in the Hepburn Law it

evinced its recognition of the harshness of the Elkins Law; and that this throws light upon the repealing section of the Hepburn law and strengthens the contention that it was the intention of Congress to release from prosecution under the former law those against whom prosecutions had not already been begun. In answer to this it might be said that it may well be questioned whether those laws had been permitted to remain a dead letter, but that, on the contrary, numerous efforts had been made and were being made to enforce them; and it might also be said that Congress did not recognize the harshness of the Elkins Law by inserting in the amendment thereto the word "knowingly," but inserted that word for another and a very good reason. The punishment prescribed by the Hepburn Law, amending and superseding it, is fine or imprisonment in the penitentiary for a term not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Does it not strike one with much greater force that the word "knowingly" was inserted because the offense had thus been made an infamous one? In view of what I have already said, if I am correct in the conclusion reached, this argument is without force, because it proceeds upon the assumption that we may by interpretation or inference ascertain the intention of Congress in reference to the release from prosecution of those who had violated the repealed law. (151 Fed. Rep. 84, 96.)

From a consideration of these specific amendments to section 1 of the Elkins Law it is manifest that Congress did not consider it necessary to bar all future prosecutions under the old law because that law was too *harsh* and *stringent* in its operation. On the contrary, there is abundant reason for claiming that the Congress considered the old law as not sufficiently "drastic" to put a stop to those practices which apparently had been going on in utter defiance of the Elkins Act.

(4) The general policy of the law as declared in Section 13, Revised Statutes.

It was the rule at common law that the repeal of a statute operated to release and extinguish all penalties, forfeitures, and liabilities which had accrued under the prior law. In 1871 Congress expressly abrogated that rule by enacting the provisions contained in section 13 of the Revised Statutes. Since that time general saving statutes have been passed by the legislatures of substantially all the States of the Union. The effect of this legislation has been to declare and establish a general policy of the law with respect to the effect of a repealing statute. The mere fact that these general saving clauses have remained in force all these years furnishes convincing proof that all legislative bodies, both Federal and State, are opposed to the release and extinguishment of penalties, forfeitures, and liabilities after they have accrued under any

particular statute. Whenever, therefore, a particular statute, whether a repealing statute or otherwise, is susceptible of a construction that may even tend to overthrow and subvert such general policy of the law, either in whole or in part, the courts should hesitate in adopting such a construction unless the intention of the legislature to accomplish such a result is clear and certain. All questions of doubt arising in connection with the interpretation of such a statute should be resolved by the courts in favor of maintaining the general policy of the law, for it is but reasonable to suppose that whenever an exception to such general policy is desired, the law-making power will declare its intention in no uncertain or obscure language.

At the very threshold of this case, therefore, we are fortified by this general policy of the law, which is directly contrary to the policy of the common law, and its importance should not be lost sight of in the subsequent discussion of the various propositions to be considered.

(5) The subject-matter, scope, and purpose of Section 13, Revised Statutes.

By the act of February 25, 1871 (chap. 71, 16 Stat., 432), which is now incorporated in section 13 of the Revised Statutes, Congress declared that—

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute unless the repealing act shall so expressly pro-

> vide and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

In the case of *United States* v. *Reisinger* (128 U. S., 398), this court, in an opinion by Mr. Justice Lamar, considered this provision of the Revised Statutes, and recognized the right of Congress to abrogate the common-law rule as to the effect of a repeal of a particular law upon penalties, forfeitures and liabilities which had accrued under the old law.

We shall therefore assume that during the last thirty-six years it has been the general policy of Congress, as declared by this statute, to save accrued penalties, forfeitures, and liabilities from release and extinguishment, unless the intention to the contrary clearly appears. There is no mistaking the subject-matter which was before Congress when this law was enacted in 1871. They were legislating for the express purpose of preserving penalties, forfeitures, and liabilities from extinguishment and release by the repeal of any statute under which they shall have accrued. The general scope of the law is broad and comprehensive, and includes causes pending in the courts and rights of action which, at the time of the repeal, had not been brought before the courts for judicial determination. While the statute is declaratory of a general policy of the law, it likewise *ex necessitate* announces certain rules for the guidance of the courts in the interpretation of repealing statutes, in order that such general policy of the law may be continued

and preserved. We think the following rules may be fairly deduced from the language employed:

> (*a*) By section 13 the courts are directed to regard a repealed statute as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of any penalty, forfeiture, or liability incurred under such statute before its repeal.

This rule is nothing more than a declaration of the general policy of the statute, and little or no difficulty could arise with respect to its practical application by the courts.

The second rule, which we think is necessarily contained in section 13, is equally positive but perhaps more difficult of application.

> (*b*) By section 13 the courts are enjoined to regard a repealing statute as not having the effect of releasing or extinguishing any penalty, forfeiture, or liability incurred under such statute 'unless such repealing act shall so expressly provide."

It is asserted that the courts should not be bound by this rule, for the reason that it attempts to control future Congresses as to the manner in which they shall express their intention (*Sutherland on Statutory Construction*, 2d ed., sec. 355; *Manigault* v. *Springs*, 199 U. S., 473), and that as the intention of the legislature constitutes the law, such intention may be as effectually manifested by what is necessarily implied as by what is expressed. (*Telegraph Company* v. *Eyser*, 19 Wall., 419; *McHenry* v. *Alford*, 168 U. S., 651.)

Our contention is, however, that the phrase "unless such repealing act shall so expressly provide," is not to be construed as an attempt to hinder or impede future Congresses as to the manner in which they shall legislate, but was designed as a protection to future Congresses in order that the courts may not have an opportunity to declare that the law-making power meant a certain thing by implication, which as a matter of fact it did not mean. In other words, a rule of law for the guidance of the courts has been established in order that this general policy of the law with respect to the preservation of penalties, forfeitures, and liabilities may not be subverted in whole or in part by mere implication.

In the case of *United States* v. *Barr* (24 Fed. Cas., 1016), the court, in speaking approvingly of section 13 of the Revised Statutes, said:

> This section 13 is a salutary provision, and if it, or something like it, had always been incorporated in the statutes of the States and the United States, it would have prevented many a lame and impotent conclusion in criminal cases, in which the defendant escaped punishment because the legislature, in the hurry and confusion of amending and enacting statutes, had forgotten to insert a clause to save offenses and liabilities already committed or incurred from the effect of express or implied repeals.

That court recognized, what all courts should recognize, and what the legislatures of the various States have recognized, namely, that "in the hurry

and confusion of amending and enacting statutes" legislatures often forgot "to insert a clause to save offenses and penalties already committed or incurred from the effect of express or implied repeals." This idea, in our judgment, furnishes the key to the correct interpretation of this statute.

There is no doubt that when this statute was enacted Congress had in mind that cases would frequently arise in the future, as they had arisen in the past, in which an implication might be indulged in by the courts which would operate to annul and defeat this general policy of the law, so far, at least, as such particular statute was concerned. Congress then recognized, as the courts should now recognize, that the latent and hidden consequences of such implications are not always as readily discernible to the legislative mind as they are to the courts, and especially is this true when we consider that the particular language employed by a legislative body is seldom subjected to such close scrutiny and analysis as it is when brought before the courts for judicial interpretation.

We submit, therefore, that the rule necessarily contained in this statute is a safe and salutary one, bottomed upon sound principle, and within the constitutional power of the legislature to prescribe, and that its recognition by the courts will afford a safer guide for ascertaining the legislative intent in cases of this character than a tenacious adherence to the doctrine of implication, which experi-

ence has shown so frequently to be an unsafe guide in determining the real purpose of the law.

Authorities in support of this contention:

In support of the proposition that this language should be construed as laying down a rule of construction for the guidance of the courts instead of an attempt upon the part of the legislature to bind succeeding legislatures as to the manner in which they might effect the repeal of a particular statute, we quote the following:

> One legislative body can not tie the hands of its successors with respect to either subject-matter or method of subsequent legislation, But section 13, as I view it, evinces no such attempt. The Congress of 1871 was not addressing itself particularly to succeeding Congresses, but particularly to the courts. The courts are commanded by section 13 to treat a repealed statute as still remaining in force for punishment of violations thereof unless the courts shall find that the repealing act "expressly provides" that such repealed act shall not sustain any prosecutions for its violation. (*Lang et al.* v. *United States*, 133 Fed. Rep., 201, 206.)

Commenting on a saving statute very similar in its scope to section 13 of the Revised Statutes, the court in the case of the *People* v. *Madill* (36 N. Y. Supp., 534, 537), said:

> The legislature, therefore, by the act of 1892 laid down a rule of statutory construction

> applicable to all future statutes. The act did not attempt to interfere in any manner with future legislation, but simply prescribed a rule of construction applicable when not inconsistent with the general object of the subsequent statute, or the language construed, or other provision of the repealing law indicating a different intent.

Judge Morris, in his opinion in the case at bar in the court below, said:

> It seems to me that it is wide of the mark to say that one legislature can not tie the hands of subsequent legislatures. It is more to the purpose to say that the legislature *can* bind the hands of the courts as to rules of construction. Section 13, to my mind, evinces no attempt on the part of the Congress of 1871 to bind the hands of subsequent Congresses. If that argument were pursued to its ultimate conclusion, it would mean that section 13 would only apply to the acts of the Congress that passed it, and that whenever any subsequent Congress, in express terms, repealed a penal statute, it by that means did away with section 13, and clearly evinced an intention that section 13 should not apply thereto. In the Reisinger case the Supreme Court of the United States holds exactly the contrary to this. The title of the act in which section 13 was enacted (which I have heretofore given) shows clearly and beyond doubt the purpose of that section, and that it was to prescribe a rule of construction to the courts and not an attempt to tie the hands of future Congresses.

By section 13 Congress, in words so plain that they do not need any construction, says to the courts, as it has a right to say, that when we repeal a penal statute, you shall not release those who have violated the act repealed from punishment for violations thereof, unless the repealing act so expressly provides; unless we say expressly, not by implication, that such persons shall be released, you shall treat the repealed statute as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement thereof; if we do not say so expressly—that is, in so many words—you shall not by applying the accepted or common-law rules of construction imply that we have intended to release such persons; if we intend to do that, we will say so in express terms. If this be true, the ancient maxim or rule of construction, "*Expressio unius est exclusio alterius*," can not be invoked here. (151 Fed. Rep., 84, 93.)

(6) THE PROVISIONS CONTAINED IN SECTION 10 OF THE HEPBURN ACT CONSTRUED AND APPLIED AS SAVING OLD METHODS OF PROCEDURE WITH RESPECT TO THE PROSECUTION OF PENDING CAUSES.

It is a matter of record in the various United States courts that at the time this legislation was enacted there were pending in those courts eighteen civil cases and about forty criminal cases instituted by and under the direction of the Attorney-General for violations of the interstate commerce law. These causes, together with all other liabilities and

penalties which had accrued under the old law, were expressly saved from release and extinguishment by the general saving clause contained in section 13 of the Revised Statutes. It is not to be presumed, therefore, that Congress would do a useless thing in attempting to save them over again, nor is it to be presumed that if Congress intended to release and extinguish those penalties and liabilities which had accrued under the old law, but which were not at that time before the courts, it would have indicated its purpose so to do in such an indirect manner. It is difficult to conceive of Congress doing that which was evidently vain and useless, in order that *by so doing its intention* might be conveyed to the courts that it proposed by implication to release and extinguish all those rights of action which were not then before the courts.

The situation, however, presented a matter which might very properly have been deemed an important subject for legislation. These causes, both civil and criminal, were pending in the courts. The amendments to the old law were numerous and far-reaching. It is perfectly conceivable that Congress concluded that such amendments might possibly affect *pending causes* to the prejudice of the litigants. Under such circumstances what would be more natural than for Congress to declare "but amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law." It is of little consequence that

Congress may have overestimated the importance of such a provision or that certain amendments contained in the new law might not have been held by the courts as necessarily affecting pending cases. The fact remained that all amendments affecting procedure would have been applied by the courts to those pending causes unless Congress had expressly declared its purpose to the contrary, as it did in this law.

While section 10 repeals all laws and parts of laws in conflict with the provisions of the act, it does not purport to extinguish causes of action theretofore accrued. On the contrary, the proviso that "the amendments herein provided for shall not affect causes *now pending* in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law" clearly means that the amendments therein provided for shall affect causes of action which had theretofore accrued but which were *not* pending in courts of the United States, and that such causes when instituted shall be prosecuted to a conclusion in the manner provided for in the *new* act.

The language used suggests that Congress had by the new act made certain changes in existing law affecting the *manner* in which causes of action arising thereunder should be conducted. Such, indeed, was the fact; but before adverting to those changes it is important to observe that the language of section 10 is that the amendments provided for in said act shall

not affect causes now pending in "courts of the United States." The act deals with causes of action not only *in the courts of the United States* but *before the Interstate Commerce Commission*. In view of this circumstance the fact that Congress provided that the amendments should not affect causes of action then *pending in courts of the United States*, also implies that such amendments should affect causes of action *then pending before the Commission*, as well as *those not before the courts*. And so the Commission has held in an opinion rendered November 14, 1906, in the case of *The Cattle Raisers' Association of Texas* v. *Missouri, Kansas and Texas Railway Company et al.*

In that case the complainant filed its petition with the Commission under section 13 of the old interstate commerce act on February 10, 1904, and the Commission held that it was entitled to make an order in the case under the fifteenth section of the act as amended by the act of June 29, 1906. The Commission said:

> The act to regulate commerce has always provided that the rates charged by carriers subject to its provisions should be just and reasonable. In this respect the law stands to-day precisely as it has stood from the beginning. Under the act previous to this amendment it was the right of a party to complain that rates were unjust and unreasonable, and it was the duty of the Commission to consider that complaint in precisely the same way that it is now. If it found that the rate was unjust and unreasonable, it was its further duty, in passing upon a demand for reparation, to determine by how much that rate had been un-

> just in the past. Looking to the future, however, it could only direct the carrier to cease and desist from charging the unreasonable rate. To-day, in this latter respect, it can go further and can fix the rate, which the carrier may not exceed. In other words, the amended act confers upon the Commission the power to enforce what has always been a requirement of the statute by the application of a new remedy. In this sense alone can it be said that the amended fifteenth section, as applied to a case like that before us, enlarges the jurisdiction of the Commission.

The Commission then said that a prerequisite to an order under the new fifteenth section was that there should be a formal complaint filed under the thirteenth section and a full hearing of the parties; that in the amendments made by the act of June 29, 1906, the thirteenth section had been in no respect changed, and the first prerequisite was fulfilled by the petition theretofore filed in the case, and the second would be fulfilled by giving an opportunity for the introduction of such further testimony as the parties might desire. In conclusion, the Commission said:

> This view is confirmed by a consideration of what would be the consequence of a contrary holding. The fifteenth section was amended by rewriting the section itself. There is to-day no fifteenth section as it existed when this complaint was filed, and there is no provision under which the terms of that section have been continued in force. If, therefore, it should be held that this Commission has no authority to make an order in the case before

us under the fifteenth section as it now stands, it must follow that no order of any sort can be made; in other words, that this proceeding has been ended by legislative enactment. When it is remembered that there were pending before this Commission a great number of complaints at the time of this amendment in all stages of advancement, that in many of them large sums of money and much time had been expended in the taking of testimony, it is incredible that Congress can have intended to arbitrarily and unnecessarily terminate these suits which had been brought and prosecuted in good faith under the law as it previously stood. Certainly, no interpretation should be given this statute which will produce such a result in the absence of explicit language to that effect.

We think that this case should be set down for further hearing; that both the complainant and the defendants should be allowed to introduce such additional testimony as they may be advised; that thereupon the Commission should reexamine the whole record and reach such conclusion as justice requires, and that upon this conclusion it should proceed under the fifteenth section, as it now stands, to the making of an order.

(7) DIFFERENCES BETWEEN THE OLD LAW AND THE NEW IN RESPECT TO PROCEEDINGS BEFORE THE INTERSTATE COMMERCE COMMISSION AND THE COURTS.

Under section 15 of the interstate-commerce act as it stood prior to the passage of the Hepburn Act, the power of the Commission, in the case of com-

plaints made to it of violations of the act, was limited to ordering the carrier to cease and desist from such violation, or to make reparation for the injury done, or both. Under that section as it now stands, the Commission is authorized to fix just and reasonable *maximum rates and charges* for the transportation of persons and property by the carrier, as well as to establish through routes and joint rates, besides ordering the carrier to cease and desist from further violation of the law. And by the first paragraph of section 16, as amended by the Hepburn Act, the Commission is authorized, if after hearing a complaint under section 13 of the act it determines that the complainant is entitled to an award of damages, to direct the carrier to pay the complainant the sum to which he is entitled on or before a day named. This latter provision does not differ materially from the old law.

Section 16 of the old law dealt with the subject of proceedings in the courts to enforce the orders of the Commission. By that section such proceedings were divided into two classes—those not founded upon a controversy requiring trial by jury under the seventh amendment to the Constitution, and those so founded. In respect to proceedings of the first class the old section authorized the Commission or any company or person interested in the order or requirement of the Commission "to apply *in a summary way*, by petition to the Circuit Court of the United States *sitting in equity*," in the district designated, for the enforcement of said order, and authorized said court to hear

and determine the matter on short notice, it being provided that "said court shall proceed to hear and determine the matter speedily as a court of equity, *and without the formal pleadings and proceedings applicable to ordinary suits in equity*, but in such manner as to do justice in the premises." And to that end such court was authorized, if it thought fit, "to direct and prosecute, in such mode and by such persons as it may appoint, all such inquiries to enable it to form a just judgment in the matter of such petition." On such hearing the findings of fact in the report of the Commission were made prima facie evidence of the facts therein stated. If it were made to appear to the court on such hearing, or upon the report of any person or persons appointed by it to prosecute said inquiries "*that the lawful order or requirement of the Commission drawn in question has been violated or disobeyed*," the court was authorized to issue a writ of injunction or other process, mandatory or otherwise, to restrain the carrier from continuing such violation and to enforce obedience to the order or requirement of the Commission. The court was also authorized to punish disobedience of its orders by attachment and other proper process, and by the imposition of fines.

In the case of proceedings of the second class—those founded upon a controversy requiring a trial by jury, which presumably related to proceedings to enforce an order of the Commission to make reparation—any company or person interested in the order or requirement of the Commission was authorized to apply "*in a summary way* by petition to the Circuit

Court of the United States *sitting as a court of law*," in the district specified. The court was thereupon required by its order to fix a time and place for the trial of said cause, not less than twenty nor more than forty days from the date of said order, and the marshal was directed forthwith to serve a copy of the petition and order upon each of the defendants, who were required to file their answers to said petition within ten days after such service. At the trial the findings of facts of the Commission, as set forth in its report, were declared to be prima facie evidence of the facts stated therein. If either party demanded a jury or omitted to waive a jury, a jury was to be summoned to by the court; but if all the parties waived a jury, in writing, the court was to try the cause and render judgment thereon.

In both classes of proceedings either party might appeal to the Supreme Court if the subject in dispute was of the value of $2,000 or more. In respect to the first class of proceedings it was provided, however, that "such appeal shall not operate to stay or supersede the order of the court or the execution of any writ or process thereon; and such court may, on every such matter, order the payment of such costs and counsel fees as shall be deemed reasonable." In respect to the proceedings founded upon a controversy requiring trial by jury it was provided that "such appeal must be taken within twenty days from the day of rendition of the judgment of said Circuit Court," and that "if the judgment of the Circuit Court shall be in favor of the party complaining,

he or they shall be entitled to recover a reasonable counsel or attorney's fee, to be fixed by the court, which shall be collected as part of the costs of the case."

Section 16, as amended by the Hepburn Act, also divides proceedings for the enforcement of the orders of the Commission into two classes, but they are differently described. The first class comprises proceedings to enforce orders for the payment of money; the second, proceedings to enforce orders other than for the payment of money.

In respect to the first class it is provided that if a carrier does not comply with an order for the payment of money within the time limit of such order the complainant, or any person for whose benefit such order was made, may file in the Circuit Court of the United States designated a petition setting forth briefly the causes for which he claims damages and the order of the Commission in the premises. "Such suit," it is provided, "*shall proceed in all respects like other civil suits for damages*, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, *and except that the petitioner shall not be liable for costs in the Circuit Court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal.*" If the petitioner finally prevails he is to be allowed a reasonable attorney's fee, to be taxed and collected as costs. Then follows a limitation of two years for presenting complaints for the recovery of damages to the Commission and of one year for

the filing of a petition in the Circuit Court for the enforcement of an order of the Commission for the payment of money, with a proviso that claims accrued prior to the passage of the act may be presented in one year.

In respect to suits for the enforcement of orders of the Commission awarding damages it is also provided that all parties in whose favor such an award is made may be joined as plaintiffs and all carriers parties to such order may be joined as defendants; that such suit may be maintained in any district where any one of such joint plaintiffs could maintain such suit against any one of such joint defendants, and that process may be served upon any one of such defendants that may not be found in the district where the suit is brought in any district where it has its principal office. In case of such joint suit the recovery, if any, may be by judgment in favor of any one of such plaintiffs against the defendant found to be liable to him. These provisions are wholly new.

As to orders of the Commission other than for the payment of money, the amended section 16 provides that while the same is in effect, any party injured by the failure or neglect of the carrier to obey such order, or the Commission in its own name, may apply to the proper Circuit Court for the enforcement of such order. "Such application," the amended section provides, "shall be by petition, which shall state the substance of the order and the respect in which the carrier has failed of obedience, and shall be served upon the carrier in such manner as the court may direct, and the

court shall prosecute such inquiries and make such investigations, through such means as it shall deem needful in the ascertainment of the facts at issue or which may arise upon the hearing of such petition." If, upon such hearing as the court may determine to be necessary, it appears "*that the order was regularly made and duly served*, and that the carrier is in disobedience of the same," the court "shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it, or them, obedience to the same; and in the enforcement of such process the court shall have those powers ordinarily exercised by it in compelling obedience to its writs of injunction and mandamus."

As to appeals to the Supreme Court, the amended section 16 provides:

> From any action upon such petition an appeal shall lie by either party to the Supreme Court of the United States, and in such court the case shall have priority in hearing and determination over all other causes except criminal causes, but such appeal shall not vacate or suspend the order appealed from.

It will be observed that there is no limitation as to the amount involved, as in the case of the original section.

Then follow entirely new provisions in regard to suits to enjoin, set aside, annul, or suspend the orders or requirements of the Commission.

The amended section 16 also provides:

> The copies of schedules and tariffs of rates, fares, and charges, and all contracts, agreements, or arrangements between common carriers filed with the Commission as herein provided, and the statistics, tables, and figures contained in the annual reports of carriers made to the Commission, as required by the provisions of this act, shall be preserved as public records in the custody of the secretary of the Commission, and shall be received as prima facie evidence of what they purport to be for the purpose of investigations by the Commission and in all judicial proceedings; and copies of or extracts from any of said schedules, tariffs, contracts, agreements, arrangements, or reports made public records as aforesaid, certified by the secretary under its seal, shall be received in evidence with like effect as the originals.

This provision is also new.

There can be no question that Congress had in mind the changes above indicated in the *civil* proceedings in the courts to enforce the orders of the Commission when it provided in section 10 of the Hepburn Act that "the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the *manner* heretofore provided by law."

The language used and the circumstances of its enactment, as well as the anomalous results that

would otherwise be produced, also show that Congress had in mind only such changes in the *civil* proceedings in the courts of the United States when it used the language quoted, and was not referring in any way to criminal prosecutions for the violation of the Elkins Law.

It appears on the face of the Hepburn Act, that the provision of section 2 in relation to the Elkins Law is an interpolation. With this exception, the Hepburn Act, is confined entirely to the amendment of the act to regulate commerce of February 4, 1887. Section by section it proceeds to amend the sections of that act or to add new sections thereto. The amendment to the Elkins Law is interpolated in section 2, which section purports at the outset simply to amend section 6 of the act to regulate commerce, as amended March 2, 1889. The legislative history of the act confirms this view, for it appears that such provision was inserted in the Senate, while section 10 was in the original Hepburn bill as it passed the House.

The question then is whether the provision of section 10 referred to, which in its inception clearly had reference only to civil proceedings in the courts of the United States for the enforcement of the orders of the Commission, and which as applied to such proceedings operated in no way to extinguish or release prior causes of action, should have the effect, because of the interpolation in section 2 of an amendment of the Elkins Law, of releasing from prosecution offenders under the old law against whom indictments had not

been found. In our opinion such a contention is untenable, and it would seem unnecessary to refer at all to the provision of section 13 of the Revised Statutes against implied repeals to refute it.

(8) Legislative History of Hepburn Act.

An examination of the debates of the first session of the Fifty-ninth Congress, when this law was under consideration, is not very illuminating, for it does not appear that section 10 provoked any discussion or received any consideration, either in the Senate or the House of Representatives. But the history of the act throws additional light upon the interpretation of this provision.

The Hepburn bill (H. R. 12987) was first introduced in the House of Representatives on the 24th day of January, 1906, and was referred to the Committee on Interstate and Foreign Commerce and ordered to be printed. (Cong. Rec., vol. 40, pt. 2, p. 1520.) On the 27th day of January, 1906, this bill, with amendment, was reported back by the Committee on Interstate and Foreign Commerce and referred to the Committee of the Whole House on the state of the Union. (Cong. Rec., vol. 40, pt. 2, p. 1657.) On the 8th day of February, 1906, it passed the House of Representatives with but 7 dissenting votes. (Cong. Rec., vol. 40, pt. 3, p. 2303.) When this bill was first introduced in the House of Representatives and when it first passed that body on the 8th of February, it contained section 10 in the exact words in which that section of the bill finally passed both Houses of Congress on the 29th day of June, 1906.

It is interesting to note that the Hepburn bill, while before the House of Representatives prior to the 8th day of February, 1906, not only did not contain any provision amending or purporting to amend the Elkins Act of February 19, 1903, but did not contain any provisions amending or purporting *to amend* any of the *criminal provisions* of the old interstate-commerce law. It was when the bill reached the Senate that the provision was inserted amending the first section of the Elkins Act. It is clear, therefore, that the framer of the Hepburn bill and the House of Representatives when the bill first passed that body on the 8th day of February, 1906, did not consider the language of section 10 immediately following the repealing clause as having any reference to criminal cases.

Furthermore, as a matter of fact there were no criminal cases pending in the courts of the United States at that time for violations of the interstate-commerce law, except those which were predicated upon facts showing a violation of section 1 of the Elkins Act, and inasmuch as section 1 of the Elkins Act was *not amended or in any way affected* by the *original Hepburn bill*, as it passed the House, it would seem to be a just and reasonable inference that the language as originally employed was intended to refer only to civil causes.

While these facts may not be of controlling importance, we submit that they constitute a few of the many circumstances to be considered as tending to show that the Congress in using this lan-

guage did not entertain the remotest idea that it would or might be construed by the courts as releasing and extinguishing by implication all penalties, forfeitures, and liabilities which had accrued under the old law, but which were not then before the courts.

(9) THE TERM "CAUSE" IMPLIES CIVIL RATHER THAN CRIMINAL PROCEEDINGS, AND SHOULD NOT BE CONSTRUED TO EXTEND TO THE LATTER IF IT WOULD DO VIOLENCE TO THE INTENTION OF CONGRESS.

As stated, the fact that the provision of section 10 as to pending causes was in the act prior to the interpolation of the provision in section 2 amending the criminal features of the Elkins Law shows clearly that such provision originally had reference to civil proceedings in the courts of the United States for the enforcement of the orders of the Commission. The term "cause" was an apt expression to designate such a proceeding. It suggests a civil action and not a criminal prosecution. While it might, if the spirit and purpose of the act showed that it was so intended, be held broad enough to include criminal prosecutions, certainly it should not be so construed where the effect would be to produce a wholly anomalous and unforeseen result. And it is apparent that Congress could not have intended the provision in question to operate as a pardon and immunity in respect to criminal matters though not as to civil, and especially to authorize the prosecution of those offenders against whom indictments had been returned, while letting all others go unpunished.

(10) THE NEW LAW INDICATES THE INTENTION OF CONGRESS THAT RIGHTS AND LIABILITIES INCURRED UNDER THE OLD LAW WERE NOT TO BE EXTINGUISHED.

The new section 16, after authorizing the Commission to make an award of damages to a complainant against a carrier and providing for proceedings in the proper circuit court of the United States to enforce the orders of the Commission, contains this provision:

> All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court within one year from the date of the order, and not after: *Provided*, That claims accrued prior to the passage of this act may be presented within one year.

The limitation of two years placed upon the filing with the Commission of complaints for the recovery of damages, and of one year for the enforcement of orders of the Commission, made it necessary, if all prior accrued rights and liabilities of this sort were to be saved, to allow a certain period in which such prior accrued claims might be presented. The proviso was therefore added, "that claims accrued prior to the passage of this act may be presented within one year." Had there been no period of limitation fixed, there would have been no necessity for the proviso. The provisions of section 10 could not have affected such claims in any way, as the Hep-

burn Act contains no amendments which would impair a claim for damages arising under the prior law. The addition of the proviso, however, unmistakably indicates the intention of Congress that prior accrued rights and liabilities were not to be extinguished.

(11) REPEALS BY IMPLICATION ARE NOT FAVORED.

In order to sustain the contention of counsel for the petitioner the doctrine of repeal by implication must be invoked and applied. The rule of law that repeals by implications are not favored is so well recognized by the courts as to render a citation of authorities unnecessary. If, therefore, it is possible to construe the language employed in section 10 of the rate law in such a manner as to avoid the implication that section 13 of the Revised Statutes has been repealed in so far as it would operate to save penalties, forfeitures, and liabilities which had accrued at the time this law was passed, it would certainly be the duty of the courts to adopt such a construction.

(12) THE LANGUAGE OF SECTION 10 OF THE RATE LAW AND THE GENERAL SAVING CLAUSE IN SECTION 13 OF THE REVISED STATUTES ARE IN NO SENSE INCONSISTENT AND MAY STAND TOGETHER.

Conceding for the purpose of the argument that the language of section 10 is sufficiently comprehensive, when considered literally and standing apart from the general saving provision contained in

section 13 of the Revised Statutes, to warrant the deduction of the implication contended for, yet when that language is considered in connection with section 13 is not such implication necessarily destroyed? The answer to this question is to be found in the well-recognized principle of law that a perpetual statute is to be considered in force as to the particulars of the subject-matter legislated upon until repealed by an act professing to repeal it or by a clause or section of another act directly bearing in terms upon the particular matter of the first act, and this, too, notwithstanding an implication to the contrary which may be raised by a general law embracing the subject-matter. Upon this point Circuit Judge Van Devanter in his opinion says:

> But does this language (the language contained in section 10 of the rate law) plainly or necessarily refer to the effect of the repeal upon the enforcement of penalties for prior offenses? We say plainly or necessarily, because to establish a supersession of repeal of a statute by implication it is not sufficient to show merely that the later statute, making no mention of the particular subject of the first, employs language broad enough to cover some part or all of it; for, as words are sometimes employed with less than their largest literal meaning, it must also appear that the two statutes can not stand together, reasonable purpose and operation being accorded to each. Particularly is this true if the first expresses a settled policy in legislation. (*Wood* v. *United States*, 16 Pet., 342, 362; *United States* v. *Gear*, 3 How., 120,

131; *Frost* v. *Wenie*, 157 U. S., 46, 58; *United States* v. *Healey*, 160 U. S., 136, 146; *Rosecrans* v. *United States*, 165 U. S., 257; *United States* v. *Greathouse*, 166 U. S., 601; *McChord* v. *Louisville & Nashville R. R. Co.*, 183 U. S., 483, 500.) (155 Fed. Rep., 945, 960.)

(13) THE CASE OF THE STATE v. SHOWERS (34 KANSAS, 269) DISTINGUISHED.

The Showers case was a prosecution for a violation of the Kansas prohibitory liquor law. The defendant was convicted on the charge of having violated section 7 of the act of 1881. The indictment was returned on the 23d day of April, 1885, and charged the defendant with having sold intoxicating liquors on the 20th day of February, 1885, in violation of section 7 of the law of 1881. Between the 20th day of February, 1885, the day on which the offense was committed, and the 23d day of April, 1885, the day on which the indictment was returned, a new law had been enacted by the legislature of the State of Kansas, which went into effect on the 10th day of March, 1885. Section 19 of this new act contained a clause expressly repealing certain sections of the old law, together with a special saving clause. It read as follows:

> Original sections two, three, four, *seven*, eight, nine, twelve, thirteen, and twenty-one of the said act, to which this act is amendatory and supplemental, are hereby repealed. All prosecutions pending at the time of the taking effect of this act shall be continued the same as if this act had not been passed.

There was also a general saving statute of the State in force at that time which contained among other provisions the following:

> SECTION. 1. In the construction of the statutes of this State the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature, or repugnant to the context of the statute.
>
> *First.* The repeal of a statute does not revive a statute previously repealed, nor does such repeal affect any right which accrued, any duty imposed, any penalty incurred, nor any proceeding commenced under or by virtue of the statute repealed. The provisions of any statute so far as they are the same as those of any prior statute shall be construed as a continuation of such provisions, and not as a new enactment. (Comp. Laws of 1879, ch. 104, sec. 1.)

The Supreme Court of Kansas held that notwithstanding this general saving statute the legislature of 1885 intended by section 19, above quoted, to save only those prosecutions which were pending in the courts at the time the new act took effect and that all offenses which had accrued under the old law, but which were not pending in the courts on the 10th day of March, 1886, were by implication barred from future prosecution.

(*a*) *The general saving clause of the Kansas law and of the Revised Statutes of the United States distinguished.*

It will be observed that the general saving clause of the Kansas statute and the general saving clause

contained in section 13 of the Revised Statutes, are materially different. It is true that each of these general saving clauses expressly abrogate the common law rule as to the effect of a repealing statute by providing that whenever a statute is repealed it shall not operate to release or extinguish any penalty, forfeiture, or liability which may have accrued thereunder. The Federal saving statute, however, goes further and declares that a repealing statute shall not so operate "unless the repealing act shall so expressly provide." Under the Kansas statute the courts are permitted in ascertaining the legislative intention to indulge in implications, and it was through the application of such principle of law that the decision of the Supreme Court of Kansas was reached in the Showers case. The Federal statute, however, expressly forbids the courts from resorting to the rule of implication in order to determine the intention of Congress.

In determining the question of legislative intent it is not so important to know precisely what the Congress may lawfully and constitutionally do as it is to know what the Congress conceived its powers to be with respect to the particular matter in controversy. It is certain that the Congress which passed the general saving clause contained in section 13 and the subsequent Congresses which have at least tacitly approved that law considered that they had the power to prohibit the courts in construing a repealing statute from indulging in an implication which would result in the extinguishment or release of penalties,

forfeitures, and liabilities. If, therefore, Congress was of the opinion that it had such power, it is of little or no concern in determining the *question of legislative intent*, that it had exceeded its power in this direction.

(*b*) *The special saving clause of the Kansas statute and of the Rate Law distinguished.*

It will be noted that the special saving clause in section 19 of the Kansas statute is concerned specifically with pending prosecutions. It reads "*all prosecutions* pending at the time of the taking effect of this act shall be continued the same as if this act had not been passed." The *subject* of the sentence is "pending prosecutions," and it is declared that they "shall be continued the same as if this act had not been passed." The implication therefore is very direct that the legislature intended that *prosecutions* which were *not pending* at the time the act took effect should *not be continued.*

The *subject* of the special saving clause in section 10 of the rate law is "the amendments," and it is declared that *such amendments* shall not *affect* causes now pending in the courts of the United States. The *implication* which necessarily arises from this language is that "the amendments" may affect causes which were *not* then pending in courts of the United States. If this be conceded it is obvious that such amendments could only affect causes which were not pending in the courts of the United States *with respect to procedure.*

It is apparent, therefore, that the necessary implication to be deduced from the language employed in the Kansas statute is essentially and materially different from the necessary implication contained in the language employed by the Fifty-ninth Congress in section 10 of the rate law.

If the rate law had contained an "amendment" releasing and extinguishing penalties, forfeitures, and liabilities which had accrued under the old law, then the language employed in section 10 would necessarily operate as a saving clause with respect to pending causes in the sense for which the petitioner contends; but none of the amendments therein provided suggests in the remotest degree the release or extinguishment of accrued rights, penalties, and liabilities.

It follows that "the amendments" referred to in section 10 are only such as might have affected causes pending in the courts if the old methods of procedure had not been thus expressly preserved.

(14) THE PURPOSE OF THE JOINT RESOLUTION OF JUNE 30, 1906.

It may be suggested that the joint resolution of June 30, 1906, by which the operation of the rate law was suspended for sixty days, was intended to give the Government an opportunity to save a large number of causes which had accrued by the institution of prosecutions in the courts before the rate law should take effect.

Such suggestion, however, is immediately repelled when we consider the necessary effect of this important legislation in other directions. In the first place several new classes of interstate common carriers were included in the new law. It is at once apparent that as to such carriers new tariffs and schedules would have to be prepared and filed with the Interstate Commerce Commission before the law went into effect, otherwise such carriers would be amenable to the new law without having had an opportunity to comply with its provisions. It requires no argument to demonstrate that the sixty days were allowed in order to afford a reasonable time for the carriers to prepare and file with the Commission their tariffs and schedules of rates, as required by the new law. In addition to this, those carriers which were subject to the old law were required to prepare and file with the Interstate Commerce Commission new tariffs and schedules with respect to many new matters and things which were not included in the old law, such as switching charges, terminal charges, icing charges, etc.

It is only reasonable, therefore, to suppose that in the passage of this joint resolution Congress intended to avoid those difficulties which we have specifically pointed out and which could not have been avoided had no provision been made against the law becoming immediately operative upon its passage and approval.

(15) THE FEDERAL COURTS, WITHOUT EXCEPTION, IN PASSING UPON THE QUESTION HERE PRESENTED HAVE DECIDED THAT NO PENALTY WHICH HAD ACCRUED UNDER THE ELKINS ACT PRIOR TO THE 29TH DAY OF JUNE, 1906, WAS RELEASED OR EXTINGUISHED BY ANY OF THE PROVISIONS CONTAINED IN THE NEW RATE LAW.

(*a*) *United States* v. *Standard Oil Company* (148 Fed. Rep., 719).

The opinion in this case was rendered by Judge Landis of the Northern District of Illinois on the 3d day of January, 1907.

(*b*) *United States* v. *Chicago, St. P., M. & O. Rwy. Co. et al.* (151 Fed. Rep., 84).

The opinion in this case was rendered by Judge Morris of the District of Minnesota on the 26th day of January, 1907. (See Rec., p. 29.)

(*c*) *United States* v. *Delaware, Lackawanna & Western Railway Company* (152 Fed. Rep., 269).

The opinion in this case is by Judge Holt of the Southern District of New York.

(*d*) *United States* v. *New York Central & Hudson River Railroad Company* (153 Fed. Rep., 630).

The opinion in this case is by Judge Hazel of the Western District of New York.

(*e*) *United States* v. *Atchison, Topeka & Santa Fe Railway Company.* (Not reported.)

The opinion in this case was rendered by Judge Wellborn of the Southern District of California on the 8th day of April, 1907.

(*f*) *United States* v. *Standard Oil Company.* (Not reported.)

The opinion in this case was rendered by Judge McCall of the Western District of Tennessee on the 28th day of October, 1907.

(*g*) *Great Northern Railway Company* v. *United States* (155 Fed. Rep., 945).

The opinion in this case is by Circuit Judge Van Devanter of the Circuit Court of Appeals for the Eighth Circuit, Circuit Judge Adams and District Judge Riner concurring. (See Rec., p. 86.)

II.

The acts of corporate carriers in "knowingly" offering, granting, or giving, and also the acts of corporate shippers in "knowingly" soliciting, accepting, or receiving concessions, rebates, or discriminations, are within both the original and amended definition of such offenses.

We submit this, our second proposition, for the consideration of this court with considerable diffidence. The opinion of the Circuit Court of Appeals upon this point, while most satisfactory so far as the question of law involved is concerned, contains a strong intimation that the indictment is fatally defective in failing to charge *scienter*. The court then proceeds to a discussion of the general and special saving clauses heretofore considered, and the judgment of the court below is affirmed upon the theory that section 10 of the rate law does not by implication release and extinguish penalties, forfeitures, and liabilities which had accrued under the old law and which were not before

the courts for judicial determination at the time the rate law was enacted.

We feel, however, that this point should be brought to the attention of this court, in order that it may be duly considered should your conclusions upon the main question be adverse to the Government's contention. Its importance in such a contingency will be readily appreciated from the following statement of facts:

STATEMENT OF FACTS.

The indictment in the case at bar contains fifteen counts, in each of which the defendant, the Great Northern Railway Company, is charged with having "unlawfully" at the times therein mentioned granted and given to the W. P. Devereux Company, a corporation, a concession of a certain number of cents per hundred pounds, whereby certain carloads of grain were transported in interstate commerce from Minneapolis in the State of Minnesota to Seattle and other cities in the State of Washington at a rate less than the published tariffs. (Rec., 1–23.) It appears further from the stipulation of facts, upon which this case was submitted to the court and jury, that "in the case of the several shipments specified in the several counts of the indictment herein all concessions stated in the several counts respectively in said indictment were given to the W. P. Devereux Company *by the direction and with the consent* of the said defendant, the Great Northern Railway Company." (Rec., p. 54.)

From these facts, which are matters of record, it appears that the offenses charged in the several counts of the indictment were committed "knowingly." These offenses were all committed since the 31st day of July, 1905, and are therefore not barred by the statute of limitations. It requires no argument to demonstrate that if these offenses were committed by the Great Northern Railway Company, as disclosed by this record, with knowledge upon the part of that company, and that if as to such offenses the old law has not been repealed, but has been continued in full force and effect by the new law, the Government is entitled to a decision from this court which will permit the institution of new prosecutions based upon the various acts and transactions which are the subject of the several counts contained in this indictment.

ARGUMENT.

The *penalty* which may be imposed upon a *corporate* carrier or a *corporate* shipper for giving or receiving a rebate or concession was precisely the same under the old law as it is under the new law. It was only in respect to individual offenders that the imprisonment feature of the new law applies.

The new law, however, in defining the offenses of giving and receiving rebates and concessions with respect to the transportation of property among the States, uses the word "knowingly," from which it is argued that the old definition of those offenses under the first section of the Elkins Act has been mate-

rially contracted. Conceding *arguendo* that such is the effect of the use of this word, it does not necessarily follow that *all offenses* which were formerly *within* such definition under the first section of the Elkins Act are *without* the definition now contained in the new law and therefore extinguished.

It is obvious that under the Elkins Act, before it was amended, it was unnecessary for the Government to allege in the indictment or to prove upon the trial that the rebate or concession charged to have been "unlawfully" given or received was given or received "knowingly." All offenses which as a matter of fact contained the element of *scienter* were clearly within the prohibitions of the old law. If, therefore, the insertion of the word "knowingly" in the new law operated to contract the definition of this class of offenses as to future prosecutions, it certainly did not operate *to extinguish* offenses of precisely *the same character* which were committed against the old law, but only such offenses against the old law as did not contain the element of *scienter*.

The first 12 pages of Judge Van Devanter's opinion in the Circuit Court of Appeals are devoted to a demonstration of this proposition. The reasoning of the court in support of this contention is most convincing. The conclusions reached are predicated upon the following propositions:

> (*a*) A clause generally repealing "all laws and parts of laws in conflict with" the act of which it is part repeals nothing that would not be equally repealed without it.

(*b*) The rule that a later act, covering the whole subject of a prior one and embracing new provisions, plainly showing that it was intended as a substitute, operates by implication to repeal the prior act, is subject to the qualification that where the later act expresses the extent to which it is intended to repeal prior laws, as by a clause repealing all laws and parts of laws in conflict therewith, it excludes any implication of a more extended repeal.

(*c*) Statute law is not abrogated or annulled by a mere reenactment or repetition; and when, for purposes of enlargement, contraction, or otherwise, a statute is reenacted or repeated with amendments, the amendatory act is to be regarded as an affirmation and continuation of the prior law, in so far as in substance and operation it is the same, and is to be regarded as new legislation only in so far as in substance or operation it differs from the prior law.

(See opinion of the Circuit Court of Appeals, Record, pages 69 to 82, for an exhaustive review of these three propositions and authorities in support thereof.)

We respectfully submit that the decision of the Circuit Court of Appeals for the Eighth Circuit should be affirmed.

CHARLES J. BONAPARTE,
Attorney-General.

MILTON D. PURDY,
Assistant to the Attorney-General.

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In the Supreme Court of the United States.

OCTOBER TERM, 1907.

GREAT NORTHERN RAILWAY COMPANY, petitioner, *v.* THE UNITED STATES. } No. 491.

The contention of counsel for the petitioner is very concisely expressed at the bottom of page 25 of their brief in the following language:

> We contend that it clearly appears from section 10 of the Hepburn Act that Congress intended to and did remit penalties incurred under the Elkins Act prior to June 29, 1906, for which prosecutions were not pending on that date.

This contention, however, has been held untenable by several United States district courts before which the matter has arisen for judical determination and by the Circuit Court of Appeals for the Eighth Circuit in an elaborate opinion by Judge Van Devanter. The contention is thus characterized by Judge Holt of the Southern District of New York in the case of the *United States* v. *Delaware, Lackawanna and Western Railroad Company:*

> I can not believe that it was the intention of Congress that parties who had committed

16390—07——1

> offenses under the Elkins Act should be discharged from all liability because indictments had not been filed at the time the Hepburn Act was passed, while others no more morally guilty should be continued to be prosecuted under indictments found before that act was passed. I think that if that was the intention of Congress it would have said so. Section 13 of the United States Revised Statutes provides that the repeal of any statute shall not release any penalty or liability incurred under it unless the repealing act shall expressly so provide. The repealing act in this case did not so expressly provide. The best argument that can be made in support of the repeal is that it impliedly so provided. But in my opinion, since section 13 was adopted there can be no repeal by implication in such a case. (152 Fed. Rep., 275.)

Judge Landis, of the Northern District of Illinois, in the case of the *United States* v. *Standard Oil Company*, said:

> In the first place, it is inconceivable that the Congress of the United States, while addressing themselves to the task of drafting a law the great object of which was to secure to all men fair treatment in respect to the transportation of property on the basis of absolute equality, could possibly have gotten into such a frame of mind that they would divide all prior offenders into two classes, and say that those who had been indicted should be punished, and those who, up to that time, had

> avoided the grand jury, should be pardoned. For Congress to do such a thing would be both absurd and unjust. (148 Fed. Rep., 726.)

United States District Judge Morris, of Minnesota, in overruling the demurrer to the indictment in the case at bar, in the course of a very elaborate and learned opinion, said:

> But if we were permitted, in the face of section 13, to ascertain the intention of Congress by interpretation or inference, and for that purpose could look, if necessary, to the history of the legislation and of the times in which it was passed, as in that case I think we could (*U. S.* v. *Union Pac. R. R. Co.*, 91 U. S., 72; 23 L. Ed., 224), it might be well for us, while we are considering, in the light of that history, what Congress intended to do; also to consider, in the light of that history, what Congress did not intend to do. I think that to anyone at all familiar with that history it is well known that Congress, at the time of the passage of the Hepburn law, was seeking to enlarge and make more effective the powers of the Interstate Commerce Commission and was seeking not to make the laws in reference to rates and rebates and concessions less stringent, but more stringent, and was seeking, above all things, to prevent the Interstate Commerce Commission from being sheared of its powers and the objects of the law nullified by proceedings in court and the necessary delays incident thereto. I think that to anyone at all familiar with the

> condition of the public mind or with the temper of Congress at that time it must be evident that Congress did not wish to release anyone from the penalties of the laws theretofore in force, but, on the contrary, intended that all offenders against those laws should be prosecuted and that no guilty person or corporation should escape. And I can conceive of no reason why Congress should wish or intend that those whose violations had been discovered and against whom prosecutions had already been commenced, even though they might be few in number, should be prosecuted to a conclusion and should suffer the penalties incurred, and that that much larger class of offenders whose violations of the law had not been discovered and against whom prosecutions had not been begun should be allowed to go free. (151 Fed. Rep., 97.)

This court is now called upon by this petitioner to reverse the decisions of these lower courts with respect to their construction of section 10 of the Hepburn law, and hold that Congress intended to grant immunity from further prosecution to all offenders against section 1 of the Elkins Act, if such offenders at the time of the passage of the Hepburn law had not actually been brought before the courts for prosecution.

All the arguments which might possibly be adduced in opposition to such a contention have been elaborately set forth in the opinions of the lower courts above referred to, and for the convenience

of this court we have printed excerpts from those opinions bearing directly upon the question involved in an appendix to this brief. The following propositions, however, may be of some assistance in arriving at a correct conclusion as to the proper interpretation of section 10 of the Hepburn Act:

I.

What might be termed evidences external of the law itself which make against the construction of section 10 as contended for by counsel for the petitioner.

(1) At the time of the enactment of the Hepburn law and for several months prior thereto the executive department of the Government had been actively engaged in the prosecution of common carriers and shippers for violations of section 1 of the Elkins Act, commonly known as rebating.

(2) During the trial of such cases disclosures were made which challenged the attention of the entire country and which established beyond question that the practice of rebating had become quite general throughout the country.

(3) The revelations incident to such prosecutions probably had much to do with influencing Congress to consider the advisability of enacting some more drastic legislation with the object of putting an end to such practices.

(4) The debates in Congress during the consideration of the Hepburn law fail to disclose a single objection to the inhibitions against rebating con-

tained in section 1 of the Elkins law, nor was the suggestion made either in Congress or out of Congress that offenses which had theretofore been committed against section 1 of the Elkins Act should be condoned.

II.

The Hepburn Act, when considered in its entirety, and especially in respect to its amendments of the Elkins Act, repels the suggestion that Congress intended to release offenders against whom prosecutions had not been instituted.

The question may be pertinently suggested that if Congress intended to relieve from future prosecution all those persons who had not yet been indicted, but who had violated the first section of the Elkins Act, why did Congress proceed to reenact, in the second section of the Hepburn law, the first section of the Elkins Act without substantially any changes? (34 Stat., 584, 585.)

It is true that the Hepburn Act contains the phrase "whether carrier or shipper" following immediately after the expression "every person or corporation," but the old law, even in the absence of such explicit language must of necessity have received such a construction. In fact, the courts have uniformly held that from the very nature of the language employed in the old law a carrier would be guilty of its violation if such carrier should offer, grant, or give a rebate, and that the shipper would likewise be amenable to such law if he should solicit, accept,

or receive a rebate. It is therefore apparent that the phrase which we find inserted in the new law, to wit, "whether carrier or shipper," neither added to nor subtracted from the gist of the offense as defined by the first section of the Elkins Act.

But it is contended that the word "knowingly" which we find inserted in the new law as an amendment to the Elkins Act operates to substantially change the character of the offense of rebating. From this it is argued that Congress regarded the Elkins Act as unduly oppressive and therefore concluded to repeal that law, except so far as those cases which were actually pending in the courts were concerned. The fallacy of such an argument is at once apparent when we consider another important amendment contained in the new law and which fully explains the reason for the use of the word "knowingly."

Congress was determined to put an end to the iniquitous practice of rebating, if possible. The penalty for the infraction of the old law was merely a fine of not less than one thousand nor more than twenty thousand dollars. Congress concluded to make the offense an infamous one by providing in the case of a natural person for imprisonment in the penitentiary for a term not exceeding two years. It was apparent, therefore, that an offense which carried with it such a severe penalty should be limited to those cases wherein the offender had "*knowledge*" of what he was doing. It seems to us, therefore,

that the severe character of the penalty imposed by the new law affords the only proper and rational explanation for inserting the word "knowingly" in the Hepburn Act.

Judge Morris in his opinion in the court below completely answers this suggestion of counsel that Congress regarded the first section of the Elkins Act as "*a harsh and stringent law*," and therefore intended to repeal the same by inserting the word "knowingly" in the Hepburn Act.

> I have not been impressed by the argument drawn from the history of the legislation in reference to rates, rebates, and concessions. In that argument it was asserted that those laws were an evolution and that the Hepburn law was the final result of that evolution. It was asserted that the laws prior to the Hepburn law had been permitted to remain a dead letter upon the statute book. It was asserted that the Elkins law was a harsh and stringent law, subjecting those who had given or accepted rebates or concessions, not knowing that they were giving or accepting such rebates or concessions, to its penalties, and that Congress, recognizing this, amended and superseded that law by the Hepburn law; that by inserting the word "knowingly" in the Hepburn law it evinced its recognition of the harshness of the Elkins law; and that this throws light upon the repealing section of the Hepburn law and strengthens the contention that it was the intention of Congress to release from prose-

cution under the former law those against whom prosecutions had not already been begun. In answer to this it might be said that it may well be questioned whether those laws had been permitted to remain a dead letter, but that, on the contrary, numerous efforts had been made and were being made to enforce them; and it might also be said that Congress did not recognize the harshness of the Elkins law by inserting in the amendment thereto the word "knowingly," but inserted that word for another and very good reason. The punishment prescribed by the Hepburn law, amending and superseding it, is fine or imprisonment in the penitentiary for a term not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Does it not strike one with much greater force that the word "knowingly" was inserted because the offense had thus been made an infamous one? In view of what I have already said, if I am correct in the conclusion reached, this argument is without force, because it proceeds upon the assumption that we may by interpretation or inference ascertain the intention of Congress in reference to the release from prosecution of those who had violated the repealed law.

III.

Section 10 of the Hepburn Act should not be construed as a "saving clause."

The fallacy which lies at the very foundation of the argument of counsel for the petitioner consists in regarding the latter part of section 10 as *a saving clause* instead of as simply declaring *a rule* for the guidance of the courts with respect to the future trial and disposition of pending cases. This idea is admirably expressed in the opinion of Judge Morris in the court below, wherein he says:

> Bringing these two sections (section 13 of the Revised Statutes and section 10 of the Hepburn law) together, as I have done, and reading them together, in view of the foregoing rule, can they be reconciled and both be made to stand? Let us not forget or leave out the words "but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law." The words "in the manner" show, to my mind, conclusively that this last clause relates only to the mode or method of procedure. Let us read this clause in connection with the words, "the amendments herein provided for shall not affect causes now pending." Shall not affect them how? Certainly in the face of section 13 and in connection with the words "in the manner," as to that only as to which they could affect them, namely, the procedure. And what amendments are referred to? Clearly none other than the amendments relating to procedure. If we are to attribute

to Congress the wisdom and learning attributed to them in the argument, they knew that where the procedure was changed all actions, civil or criminal, whether then pending or thereafter brought, would thereafter follow the new procedure. "Even where prosecutions and rights of action under a repealed enactment are preserved by a saving clause in the repealing act, yet, after the latter takes effect they must be carried on and enforced in conformity with the provisions of the repealing statute, the one repealed being preserved only to the extent of furnishing the right of action or prosecution, not the practice or mode of procedure." Endlich on the Interpretation of Statutes, 487. And, if as to actions then pending, they wished that the former provisions as to the procedure should remain in force, as I have said above, it was necessary that they should insert these words in section 10 after the repealing words. And it seems to me that, using this language which points directly to the mode of procedure, they could have intended nothing else. It seems to me that, not only may the two sections be thus clearly harmonized and made to stand together, but that they must be thus harmonized, and that the intention of Congress is thus made clear. And I think the interpretation that Congress intended by these words to release any class of offenders against the former laws from penalty, forfeitures, or liability is a forced and perverted one. (151 Fed. Rep., 99.)

This same thought was expressed by Judge Landis in his opinion in the Standard Oil case, although he, too, rather inadvertently, as we believe, refers to it as *a saving clause*. He said:

> In the second place, the saving clause is just such a provision as would have been drawn by a lawyer who had examined section 13 and desired to relieve the courts of unnecessary controversy growing out of questions of procedure. And, in the third place, in the light of the affirmance of Lang's conviction it is not such a provision as would have been drawn by any lawyer whose purpose was to insure the pardon of violators of the law. (148 Fed. Rep., 726.)

For these reasons we respectfully submit that the petition for the writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit should be denied.

MILTON D. PURDY,
Assistant to the Attorney-General.

APPENDIX.

GREAT NORTHERN RAILWAY CO. v. UNITED STATES (NOT YET REPORTED).

Judge Van Devanter in delivering the opinion of the United States Circuit Court of Appeals for the Eighth Circuit in the case at bar, after fully discussing the question as to whether the Hepburn Act operated as a repeal of section 1 of the Elkins law had the following to say with respect to the construction to be given to section 10:

In fact, it reads in this way:

"SEC. 10. That all laws and parts of laws in conflict with the provisions of this act are hereby repealed, but the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law."

Thus the special saving clause, although immediately following a repealing clause, does not in terms refer to a repeal, to penalties for prior offenses, to the remission or enforcement of any of them, or to pending causes for their enforcement, but to "the amendments herein provided for," to "causes now pending in courts of the United States," and to their continued prosecution "in the manner heretofore provided by law." Of course, "amendments" is broad enough to cover the partial repeal of section one of the Elkins Act, for that was effected through an amendment; and what is said about "causes now pending in courts of the United States" and their continued prosecution is also broad enough to cover the enforcement of penalties for prior offenses embraced in criminal causes then pending in those courts.

But does this language plainly or necessarily refer to the effect of the repeal upon the enforcement of penalties for

prior offenses? We say plainly or necessarily, because to establish a supersession or repeal of a statute by implication it is not sufficient to show merely that a later statute, making no mention of the particular subject of the first, employs language broad enough to cover some part or all of it; for, as words are sometimes employed with less than their largest literal meaning, it must also appear that the two statutes can not stand together, reasonable purpose and operation being accorded to each. Particularly is this true if the first expresses a settled policy in legislation. *Wood* v. *United States*, 16 Pet., 342, 362; *United States* v. *Gear*, 3 How., 120, 131; *Frost* v. *Wenie*, 157 U. S., 46, 58; *United States* v. *Healey*, 160 U. S., 136, 146; *Rosecrans* v. *United States*, 165 U. S., 257; *United States* v. *Greathouse*, 166 U. S., 601; *McChord* v. *Louisville & Nashville R. R. Co.*, 183 U. S., 483, 500. Or, as the same thing is at times differently expressed, a statute couched in clear and explicit terms is not overthrown by possible, but not necessary, implications flowing from after legislation. We shall refer briefly to two of the cases just cited, each dealing with a conflict literally more pronounced than that now before us. *United States* v. *Gear* arose under the public land laws. The policy of Congress to reserve from disposition under other laws public lands containing lead mines had long been expressed in an act of March 3, 1807, when an act of June 26, 1834, establishing new land districts, directed the President to cause to be offered for sale "all the lands lying in said land districts." Thus there was presented the question whether or not the later act superseded the other, there being lands of both classes in those districts; and of this the court said:

"The rule is that a perpetual statute (which all statutes are unless limited to a particular time), until repealed by an act professing to repeal it, or by a clause or section of another act directly bearing in terms upon the particular matter of the first act, notwithstanding an implication to the contrary may be raised by a general law which embraces the subject-matter, is considered still to be the law in force as to the particulars of the subject-matter legislated upon. Thus in this case all lands within the district mean lands in which there are and in which there are not minerals or lead mines;

but a power to sell all lands, given in a law subsequent to another law expressly reserving lead-mine lands from sale, can not be said to be a power to sell the reserved lands when they are not named, or to repeal the reservation. In this case there are two acts before us, in no way connected, except in both being parts of the public land system. Both can be acted upon without any interference of the provisions of the last with those of the first—each performing its distinct functions within the sphere as Congress designed they should do."

United States v. *Greathouse* arose under the laws relating to the prosecution of claims against the United States. Section 1069 of the Revised Statutes provided that such claims should be barred unless the petition was filed within six years after the claim first accrued, but contained an excepting clause in favor of married women and others, including persons beyond the seas, who were permitted to sue within three years after the disability ceased. In 1887 Congress passed an act relating to the prosecution of such claims, which, in a proviso to its first section, declared that "no suit against the Government of the United States shall be allowed under this act unless the same shall be brought within six years after the right accrued for which the claim is made," but contained no excepting clause in favor of married women or others. That act also declared all acts and parts of acts in conflict with it repealed. Greathouse was beyond the seas from 1886 to 1889, when his claim accrued, and until 1894, when his suit was commenced. In answer to the Government's contention that the excepting clause in section 1069 was displaced by the later act the court held:

"The act of 1887 only superseded such previous legislation as was inconsistent with its provisions. It is true that if that act be literally construed, there is some ground for holding that Congress intended by the proviso of section 1 to cover the whole subject of the limitation of suits against the Government, in whatever court instituted. But we can not suppose that it was intended to strike down the exceptions made in section 1069 of the Revised Statutes in favor of 'the claims of married women first accrued during marriage, of persons under the age of twenty-one years first accrued during minor-

ity, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued.' Those exceptions were not expressly abrogated by the act of 1887, and they could be held to be repealed only by implication. But repeals by implication are not favored, and when two statutes cover in whole or in part the same matter, and are not absolutely irreconcilable, effect should be given, if possible, to both of them. *Frost* v. *Wenie*, 157 U. S., 46, 58; *United States* v. *Healey*, 160 U. S., 136, 147. In conformity with this principle we must adjudge that the above proviso of section 1069 of the Revised Statutes is still in force, because not absolutely inconsistent with the last proviso of the act of 1887; consequently, that the claim of a person who was beyond the seas at the time the claim accrued is not barred until three years shall have expired after such disability is removed without suit against the Government. Although the act of 1887 prescribes the limitation for suits 'under this (that) act,' without making any exception in favor of persons under disability, it should be interpreted as if the proviso in section 1069 of the Revised Statutes were added to section 1 of that act. We could not hold otherwise without deciding, in effect, that the limitation of six years applied to claims accruing to married women and infants during their respective disabilities, as well as to the claims of idiots, lunatics, and insane persons. We are unwilling to hold that Congress intended any such result."

Can reasonable purpose and operation be accorded to the special saving clause without impinging upon the purpose and operation of the general statute? If so, it is quite plain that the broad language of the former does not necessarily relate to the particular subject of the latter, and, therefore, does not by necessary implication manifest an intention to supersede or repeal it.

When we consider that the special saving clause was part of the Hepburn bill from the time of its introduction in the House of Representatives, and that the provision amending section one of the Elkins Act did not become part of the bill until after it had passed the House of Representatives and was pending in the Senate, it is difficult to believe that the former has particular reference to the effect of the partial

repeal wrought by the latter. And, when we consider that any ground which could have been reasonably advanced for enforcing the repealed law against offenders who were then indicted would have been equally applicable to others who, within the period prescribed by the statute of limitations had offended in like manner, but were as yet unindicted, and also the marked contrast between the explicit and appropriate terms of the general statute, which was presumptively in the mind of Congress, and the altogether different terms of the special saving clause, it is difficult to believe that the latter has any reference to the particular subject of the former, namely, the effect of a repealing act upon the enforcement of penalties, forfeitures, and liabilities incurred under the law repealed.

We turn, therefore, to the other provisions of the Hepburn Act, in the light of which the special saving clause must be read, to ascertain whether or not they indicate that it has another purpose and field of operation, more consonant with reason and with its different language. That act fills twelve pages of the Statutes at Large and comprises eleven sections. Its purpose is that of perfecting the existing law regulatory of interstate commerce, and this is done by eliminating or changing old provisions deemed unsatisfactory, and by adding supplementary or auxiliary provisions intended to give greater strength and efficiency to the law. These changes all fall within the general category of amendments, but they differ widely in subject and operation. Some operate to repeal portions of the prior law imposing penalties, forfeitures, or liabilities, and therefore come within the explicit terms of the general saving clause (Rev. St., sec. 13). Others have a more immediate relation to proceedings in the courts of the United States. And still others have immediate relation to proceedings before the Interstate Commerce Commission. Within the first class is the partial repeal of section one of the Elkins Act resulting from the insertion of the word "knowingly." Within the second are several of the changes in section sixteen of the interstate-commerce act, notably those relating to the procedure in the circuit courts upon petitions for the enforcement of orders of the Interstate Commerce Commission and that

removing the pecuniary limitation upon the right of appeal to the Supreme Court in such cases. And within [the third are the change in section fourteen, some of the changes in section fifteen, and the change in the opening paragraph of section sixteen. If proper regard be had to the subject and operation of these varied changes, and also to the settled operation of the general saving clause, with which Congress was presumptively familiar, it is reasonably plain, as we think, that the special saving clause, although speaking of the amendments collectively, is directed against such of them only as, in its absence, would affect causes then pending in the courts of the United States, and is intended merely to secure the continued prosecution, in the manner theretofore provided, of such pending causes as otherwise would be affected.

In the presence of the general saving clause, pending causes for the enforcement of penalties, forfeitures or liabilities would not be affected by the repeal of portions of the prior law imposing them; nor could pending causes in the courts be affected by the changes having immediate relation to proceedings before the Interstate Commerce Commission. Thus far, therefore, there was no occasion for a special saving clause in favor of causes then pending in the courts of the United States. But the changes having immediate relation to proceedings in those courts altered the situation, for they, if not restrained, would affect both pending and future causes. (2 Sutherland St. Con., 2nd ed., Sec. 674; *Railway Company* v. *Grant*, 98 U. S., 398; *Campbell* v. *Iron Mountain Silver Mining Co.*, 27 C. C. A., 646; 83 Fed., 643.) Here, then, was occasion for a special saving clause, and the language of section ten appears to have been well chosen to meet it. True, in the absence of the general saving clause, that language would be broad enough to also cover part of the ground covered by it; that is, to save such penalties, forfeitures, and liabilities as would be enforced by the continued prosecution of pending causes; but that is not a controlling guide to its meaning, in the presence of the general saving clause, for not only is the true intendment of language often dependent upon the circumstances in which it is used, but the state of the law when a statute is enacted is always an important

factor in its interpretation. As before indicated, the special saving clause does not contain any term or expression which bears directly upon the effect of the repealing portions of the act upon existing penalties, forfeitures, and liabilities; nor does it contain anything which was not reasonably appropriate to the occasion, if Congress, mindful of the existence of the general saving clause and satisfied to leave it in undisturbed operation, was solicitous merely that the amendments bearing directly upon the jurisdiction and procedure of the courts of the United States should not affect causes then pending therein. In these circumstances we are persuaded that the special saving clause can be accorded reasonable purpose and operation by treating it as intended only to save such causes from what, without it, would be the effect of the amendments upon them, and we accordingly hold that rightly interpreted it does not cover any part of the particular subject of the general saving clause, and therefore does not by necessary implication manifest an intention to release or extinguish penalties, forfeitures, and liabilities for the enforcement of which no cause was then pending.

It follows that there was no error in the rulings of the district court, and its judgment is affirmed.

UNITED STATES v. GREAT NORTHERN RAILWAY CO. (151 FED. REP., 84, 93).

We quote that portion of the opinion of Judge Morris in overruling the demurrer in the case at bar which has special reference to the construction which should be given to section 10 of the Hepburn law:

Section 13 is, I think, as declared by Judge Deady in the case of U. S. v. Barr, 24 Fed. Cas., 1016, a wise and salutary provision. The learned judge says:

"Section 13 is a salutary provision, and if it, or something like it, had always been incorporated in the statutes of the States or United States it would have prevented many a lame and impotent conclusion in criminal cases in which the defendant escaped punishment because the legislature, in the

hurry and confusion of amending and enacting statutes, had forgotten to insert a clause to save offenses and liabilities already committed or incurred from the effect of express or implied repeals."

It seems to me that it is wide of the mark to say that one legislature can not tie the hands of subsequent legislatures. It is more to the purpose to say that the legislature can bind the hands of the courts as to rules of construction. Section 13, to my mind, evinces no attempt on the part of the Congress of 1871 to bind the hands of subsequent Congresses. If that argument were pursued to its ultimate conclusion, it would mean that section 13 would only apply to the acts of the Congress that passed it, and that, whenever any subsequent Congress in express terms repealed a penal statute, it by that means did away with section 13, and clearly evinced an intention that section 13 should not apply thereto. In the Reisinger case the Supreme Court of the United States holds exactly the contrary of this. The title of the act in which section 13 was enacted (which I have heretofore given) shows clearly and beyond doubt the purpose of that section, and that it was to prescribe a rule of construction to the courts, and not an attempt to tie the hands of future Congresses. By section 13 Congress, in words so plain that they do not need any construction, says to the courts, as it has a right to say: "When we repeal a penal statute, you shall not release those who have violated the act repealed from punishments for violations thereof, unless the repealing act so expressly provides. Unless we say expressly, not by implication, that such persons shall be released, you shall treat the repealed statute as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement thereof. If we do not say so expressly—that is, in so many words—you shall not, by applying the accepted or common-law rules of construction, imply that we have intended to release such persons. If we intend to do that, we will say so in express terms."

If this be true, the ancient maxim or rule of construction, "Expressio unius est exclusio alterius," can not be invoked here. Section 13 was a general provision of law addressed to the courts. It became a part of the general body of the

law. It has been so treated ever since its passage. It was carried into the Revised Statutes of the United States of 1878 and into the United States Compiled Statutes of 1901. It is a part of the general body of the statutes of the United States now. As I have said, it was not intended to bind the hands of subsequent Congresses, and could not bind them. But every subsequent Congress that has not repealed it has recognized it as a part of the general body of the law and as a rule of construction to be applied by the courts to acts passed by it, as much as if it had been reenacted by such Congress. The Congress of 1906 so recognized it. They knew that in the hurry and confusion of amending and enacting statutes, in the pressure upon Members of Congress, not only by reason of their having to consider all the various matters of legislation for a great nation, but also by reason of the exactions upon their time and attention as to many things not really pertaining to their legislative duties (and of this few who have not themselves been Members of Congress can have any adequate appreciation), words and phrases might inadvertently, or by mistake, or possibly by design of those in and out of Congress having an interest in the particular matter legislated upon, find their way into acts repealing penal statutes which might by the application of the accepted and common-law rules of construction release from penalty those who had violated repealed acts; and it was for this reason they originally passed and have ever since recognized and kept upon the statute books section 13 as a part of the general body of the law binding upon the courts. They showed their wisdom in recognizing that they might make mistakes, or be careless or inadvertent, and thus produce mischievous results. And this section 13 was placed by them, and has ever since its enactment been kept by them, as a sentinel on guard to prevent such mischievous results. They said to the courts, as plainly as words could say: "You shall not, by implying from words that we do use words that we do not use, remove that sentinel." They said, as plainly as they could say, to the courts: "When you come to a repealing statute of this kind, you need not—indeed, you shall not—use those keys you have been accustomed to use to unlock the doors of our

minds and ascertain our intention as to the release from penalty of those who have violated a repealed law. It will not be necessary for you to consider the niceties of grammatical construction as to whether a word is in the preterit or past tense, a participle, a connective, or a verbal adjective, in order to ascertain whether or not we intend to release violators of the repealed law. If we wish or intend to release such violators, we will say so in express words, and not leave it to be implied or inferred. If we insert clauses which we might have left out, or which we should have left out, you shall not from that infer that we intended to put in clauses that we did not put in, and thus release violators of the law."

In other words, all that is left to the courts is to say whether or not they find in the repealing act an express provision releasing offenders or any class of offenders from prosecution under the repealed act. If no such express provision is found, they are not released. I do not find any such provision in the repealing act now under consideration.

Judge Baker bases his opinion squarely upon section 13. In his opinion the result would be the same if the word "begun" meant only "already begun," as held by Judge Jenkins. Concurring fully, as I do, in his opinion, I quote it, because it is perhaps expressed in better language than I have myself been able to command. He says:

"Of course, one legislative body can not tie the hands of its successors with respect to either subject-matter or method of subsequent legislation. But section 13, as I view it, evinces no such attempt. The Congress of 1871 was not addressing itself particularly to succeeding Congresses, but particularly to the courts. The courts are commanded by section 13 to treat a repealed statute as still remaining in force for punishment of violations thereof, unless the court shall find that the repealing act 'expressly provides' that such repealed act shall not sustain any prosecution for its violation. The case of U. S. v. Reisinger, 128 U. S., 398; 9 Sup. Ct., 99; 32 L. Ed., 480, readily distinguishable from the present case in its facts, is useful here only as showing the Supreme Court's recognition (1) of what the common-law rule of construction was; (2) of the right of Congress to

legislate upon the subject-matter of rules of construction; and (3) of the fact that Congress by the enactment of section 13 abrogated the common-law canon of interpretation, hereinabove stated, respecting the effect of a repeal. If section 13 is in force in its entirety, it is the court's duty to apply the rule of interpretation therein laid down, and to treat the penal statute of 1875 as being alive for the purpose of sustaining every proper prosecution for the enforcement of its penalties, unless the amendatory and enlarging act of 1903 be found to contain an express provision for the forgiveness of the unconvicted. There is no pretense that the act of 1903 expressly so provides. If section 13 is in force in its entirety, an argument along this line—the act of 1875 was superseded by the act of 1903; the effect of the supersession was to exempt all unconvicted violators of the act of 1875 from punishment, unless Congress has provided for their prosecution; Congress in the act of 1903 has only provided that unconvicted violators against whom prosecutions were begun before March 3, 1903, may be punished; therefore unconvicted violators against whom prosecutions were begun after March 3, 1903, shall go free—is false, I think, because its keynote is the abrogated common-law rule of construction."

The contention, if it is so contended, that section 13 was partially repealed, by implication, by section 10, but only in so far as it related to prosecutions under the Elkins law of those who had not already been indicted, is, I think, fully met by what I have already said, and by Judge Baker, where he says:

"Has section 13 been repealed in whole or in part? That section furnished a complete enactment respecting one method of interpretation. Subsequent Congresses were left at liberty to legislate on that subject, as on every other within their constitutional right, and in any manner they might choose. They could amend or repeal the previous legislation. They could repeal it expressly or by implication, in whole or in part. No claim is made of an express repeal. No claim is made of a general repeal by implication. An argument is advanced, as I understand it, that section 13 has been partially repealed by implication (but only in its relation to the penal acts of 1875 and 1903), in this way:

Section 13, in its application to the acts in question, provides that unconvicted violators of the act of 1875 against whom prosecutions were begun before March 3, 1903, may be punished, and also that unconvicted violators of the act of 1875 against whom prosecutions were begun since March 3, 1903, may be punished. The act of 1903 provides that unconvicted violators of the act of 1875 against whom prosecutions were begun before March 3, 1903, may be punished, but is silent respecting the fate of those unconvicted violators of the act of 1875 against whom prosecutions had not been begun by March 3, 1903. Therefore that part of the general law embodied in section 13 which by its terms would be applicable to the unconvicted violators of the act of 1875 against whom indictments were returned after March 3, 1903, has been impliedly repealed. And the maxim, 'Expressio unius est exclusio alterius,' is evoked as clinching the argument. It strikes me as a queer doctrine that silence should accomplish a repeal. It seems to me that, instead of adverting to the maxim quoted, which may properly be applied where one must choose between alternatives, attention should be given to those principles which declare that repeals by implication are not favored, that new legislation does not supersede the old by implication unless the new covers the whole subject of the old, and that the new may reaffirm (though reaffirmation is a needless work), amend, or supplant parts of the old without affecting the force and validity of those parts concerning which the new is silent."

I can only add that it seems to me queer that Congress should intend to accomplish such a repeal in such a manner. It is equivalent to saying that, although this rule of construction contained in section 13, and addressed to the courts, directs that the repeal of a statute shall not have the effect to release from prosecution unless the repealing act shall so expressly provide, still the courts can, although there is no such express provision in the repealing act, avoid that rule and accomplish what it was intended to prevent by construing by implication that rule out of existence. It is equivalent to saying that, if we can not avoid the rule by implication or inference from the language contained in the repealing act, we can by implication or inference from that language

get rid of the rule. It is equivalent to saying that, although Congress has placed this sentinel on guard to prevent just such releases, the courts can use the key therein forbidden to be used to knock down and put out of the way the sentinel. This, as with deference, I think, would be little less than a kind of judicial legerdemain. I can not think that the courts can thus obviate a plain, positive, and unambiguous statute prescribing a rule of construction. Besides, I think that the contention is fully met by the Supreme Court of the United States in the case of Rosecrans v. U. S., 165 U. S., 257; 17 Sup. Ct., 302, 41 L. Ed., 708, wherein the court says:

"Where Congress has expressly legislated in respect to a given matter, that express legislation must control in the absence of subsequent legislation equally express, and is not overthrown by any mere inferences or implications to be found in such subsequent legislation."

I have not been impressed by the argument drawn from the history of the legislation in reference to rates, rebates, and concessions. In that argument it was asserted that those laws were an evolution and that the Hepburn law was the final result of that evolution. It was asserted that the laws prior to the Hepburn law had been permitted to remain a dead letter upon the statute book. It was asserted that the Elkins law was a harsh and stringent law, subjecting those who had given or accepted rebates or concessions, not knowing that they were giving or accepting such rebates or concessions, to its penalties, and that Congress, recognizing this, amended and superseded that law by the Hepburn law; that by inserting the word "knowingly" in the Hepburn law it evinced its recognition of the harshness of the Elkins law; and that this throws light upon the repealing section of the Hepburn law, and strengthens the contention that it was the intention of Congress to release from prosecution under the former law those against whom prosecutions had not already been begun. In answer to this it might be said that it may well be questioned whether those laws had been permitted to remain a dead letter, but that, on the contrary, numerous efforts had been made and were being made to enforce them; and it might also be said that Congress did not recognize the harshness of the Elkins law by inserting in the amendment

thereto the word "knowingly," but inserted that word for another and a very good reason. The punishment prescribed by the Hepburn law, amending and superseding it, is fine or imprisonment in the penitentiary for a term not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Does it not strike one with much greater force that the word "knowingly" was inserted because the offense had thus been made an infamous one? In view of what I have already said, if I am correct in the conclusion reached, this argument is without force, because it proceeds upon the assumption that we may by interpretation or inference ascertain the intention of Congress in reference to the release from prosecution of those who had violated the repealed law.

But if we were permitted in the face of section 13 to ascertain the intention of Congress by interpretation or inference, and for that purpose could look, if necessary, to the history of the legislation and of the times in which it was passed, as in that case I think we could (U. S. v. Union Pac. R. R. Co., 91 U. S. 72, 23 L. Ed. 224), it might be well for us while we are considering, in the light of that history, what Congress intended to do, also to consider, in the light of that history, what Congress did not intend to do. I think that to any one at all familiar with that history it is well known that Congress at the time of the passage of the Hepburn law was seeking to enlarge and make more effective the powers of the Interstate Commerce Commission and was seeking, not to make the laws in reference to rates and rebates and concessions less stringent, but more stringent, and was seeking, above all things, to prevent the Interstate Commerce Commission from being sheared of its powers, and the objects of the law nullified, by proceedings in court and the necessary delays incident thereto. I think that to anyone at all familiar with the condition of the public mind or with the temper of Congress at that time it must be evident that Congress did not wish to release anyone from the penalties of the laws theretofore in force, but, on the contrary, intended that all offenders against those laws should be prosecuted, and that no guilty person or corporation should escape. And I can conceive of no reason why Congress

should wish or intend that those whose violations had been discovered and against whom prosecutions had already been commenced, even though they might be few in number, should be prosecuted to a conclusion and should suffer the penalties incurred, and that that much larger class of offenders, whose violations of the law had not been discovered and against whom prosecutions had not been begun, should be allowed to go free.

But, even if we are permitted, in the face of section 13, as to releases from prosecution by a repealing act, to ascertain by interpretation or inference the intention of Congress, we can, by following and applying an accepted rule of construction, as binding as that contained in the maxim, "Expressio unius est exclusio alterius," ascertain the intention of Congress and reconcile section 10 and section 13, and make them both stand together. Sections 15 and 16 of the interstate commerce act (24 Stat. 384 [U. S. Comp. St. 1901, p. 3165]), as the same had been amended prior to the passage of the Hepburn Act, prescribe the mode of procedure before the Interstate Commerce Commission and in the courts to enforce the provisions of that law. By the Hepburn Act these sections are amended and superseded. It is contended by counsel for the Government that the amendments to these sections refer only to civil procedure, and by counsel for the defendants that they refer in express terms to both civil and criminal procedure. But I think the result is the same if they refer to either or both. By a comparison of the provisions of the Hepburn Act amending and superseding these sections of the former law, it is found that changes are made in the procedure therein provided for. Without following through every detail the amendments made in these sections by the Hepburn law, it will be sufficient to refer to only one.

The expediting act of February 11, 1903 (32 Stat., 823, c. 544 [U. S. Comp. St. Supp. 1905, p. 622]), entitled "An act to expedite the hearing and determination of suits in equity, and so forth," applied only to causes wherein the United States is complainant. By the Hepburn Act its provisions are made applicable to all suits, no matter who is complainant, brought in any of the circuit courts of the United States against the Interstate Commerce Commission

to enjoin, set aside, annul, or suspend any order or requirement of the Commission, including the hearing on an application for a preliminary injunction, and are also made applicable to any proceeding in equity to enforce any order or requirement of the Commission, or any of the provisions of the act to regulate commerce, approved February 4, 1887, and all acts amendatory thereof or supplemental thereto.

It is admitted by both sides—and, indeed, it is stated by counsel for the defendants to be the A B C of the law—that it is competent for Congress to make changes in the mode of procedure, and that the changes thus made would be applicable to and govern the procedure in all causes pending as well as in those thereafter commenced. This being the case, the amendments to the mode of procedure made by the Hepburn law would affect causes pending at the time of its passage as well as those thereafter brought. So that if Congress wished, as to causes then pending, to continue in force the former provisions in reference to the procedure, it was necessary that they should make provision therefor. This, I think, furnishes us a key by which we can ascertain the intention of Congress when they inserted the words, "but the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law," and it gives us a complete answer to the contention that unless those words are constructed as counsel for the defendants would have us construe them they are wholly meaningless and superfluous. Let us read section 10, in which these words occur, in connection with section 13, as the Supreme Court of the United States did in the Reisinger case. The two, thus read together, would be as follows:

"That all laws and parts of laws in conflict with the provisions of this act are hereby repealed: Provided, That said repeal shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred thereunder, unless this act shall so expressly provide, and the same shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability; but the amendments

herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law."

And let us remember always in this connection that it is the intention of Congress to release from prosecution that we are considering. It would seem to me that, thus read, no one could construe that by this section Congress intended to release any offenders against the former laws from prosecution. But if these statutes are repugnant, as it seems to me, when so read together they are not, it is a familiar rule that seemingly repugnant statutes must be so construed, if possible, as that both shall stand. "Repeals by implication are not favored, and will not be decreed, unless it is manifest that the legislature so intended. As laws are presumed to be passed with deliberation and with full knowledge of all existing ones on the subject, it is but reasonable to conclude that in passing a statute it was not intended to interfere with or abrogate any former law relating to the same matter unless the repugnancy between the two is not only irreconcilable, but also clear and convincing, and following necessarily from the language used, unless the later act fully embraces the subject-matter of the earlier, or unless the reason for the earlier act is beyond peradventure removed. Hence every effort must be used to make all acts stand, and if, by any reasonable construction, they can be reconciled, the later act will not operate as a repeal of the earlier." Am. & Eng. Ency. of Law [old ed.], vol. 23, p. 489.

Bringing these two sections together, as I have done, and reading them together, in view of the foregoing rule can they be reconciled and both be made to stand? Let us not forget or leave out the words "but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law." The words "in the manner" show to my mind conclusively that this last clause relates only to the mode or method of procedure. Let us read this clause in connection with the words "the amendments herein provided for shall not affect causes now pending." Shall not affect them how? Certainly, in the face of section 13 and in connection with the words "in the manner," as to that only as to which

they could affect them, namely, the procedure. And what amendments are referred to? Clearly none other than the amendments relating to the procedure. If we are to attribute to Congress the wisdom and learning attributed to them in the argument, they knew that where the procedure was changed all actions, civil or criminal, whether then pending or thereafter brought, would thereafter follow the new procedure. "Even where prosecutions and rights of action under a repealed enactment are preserved by a saving clause in the repealing act, yet, after the latter takes effect, they must be carried on and enforced in conformity with the provisions of the repealing statute, the one repealed being preserved only to the extent of furnishing the right of action or prosecution, not the practice or mode of procedure." Endlich on the Interpretation of Statutes, 487. And if as to actions then pending they wished that the former provisions as to the procedure should remain in force, as I have said above, it was necessary that they should insert these words in section 10 after the repealing words. And it seems to me that, using this language which points directly to the mode of procedure, they could have intended nothing else. It seems to me that not only may the two sections be thus clearly harmonized and made to stand together, but that they must be thus harmonized, and that the intention of Congress is thus made clear. And I think the interpretation that Congress intended by these words to release any class of offenders against the former laws from penalty, forfeiture, or liability is a forced and perverted one.

In the foregoing I have assumed that changes have been made by the Hepburn law in the mode of procedure, not only in civil causes but also in criminal causes, as is contended by counsel for the defendants. I think, however, there is much force in the contention of counsel for the Government that the words "causes now pending" were intended by Congress to refer only to civil causes. Counsel for the defendants have pointed out to me provisions in the Hepburn law making certain things criminal which had not theretofore been criminal, and changing the penalties for crimes under the former laws; but these do not touch the procedure in the prosecution of such crimes, and, indeed, it is difficult to see, as counsel for the Government contends,

how such procedure could have been changed. Admitting, as I think we must admit, that the word "causes" is broad enough to include both civil and criminal causes, yet, under the rule above given in relation to reconciling seemingly repugnant statutes, if a word of broad meaning is used, but if by giving to it a narrower meaning we can reconcile the seemingly repugnant provisions, and especially if the context shows by reasonable interpretation that the narrower meaning was intended, it should be construed as having that narrower meaning. If we give to this word this narrower meaning, the foregoing observations apply with equal or even greater force.

I am therefore clearly of the opinion that the demurrers should be overruled.

Memorandum.

It is proper to state that my associate, Judge Lochren, who sat with me at the hearing of these demurrers, but who takes no part in this decision, does not concur in the views expressed in the opinion herewith filed. His view is as follows:

"That section 13 of the Revised Statutes gives a rule of construction only applicable to such repealing statutes as have no express saving clause, indicating that such matter was in the mind of Congress when it passed the repealing act, and therefore was not one of the matters then expressly acted upon. Section 10 of the Hepburn Act expressly repeals the parts of the Elkins Act on which these indictments rest, and also contains an express saving clause covering only pending cases. Thus Congress in the Hepburn Act expressly provided just what penalties, forfeitures, and liabilities should not be extinguished by the repeal, and equally by the force of the express language used extinguished others. It does this by the express language of the repeal, without resorting to the maxim 'Expressio unius est exclusio alterius,' and it therefore does expressly provide that the effect of the repeal shall be different from what it would have been were there no express saving clause and the matter left to the construction required by section 13. It therefore matters not whether the saving clause thus expressed covers only civil causes or causes which are both criminal and civil."

UNITED STATES v. DELAWARE, LACKAWANNA & WESTERN RWY. CO. (152 FED. REP., 269, 274).

Judge Holt, in the case of the *United States* v. *Delaware, Lackawanna & Western Railway Company*, in an opinion overruling a demurrer to the indictment held that section 10 of the Hepburn law does not operate to relieve from prosecution persons who had been guilty of violations of section 1 of the Elkins Act, but who had not been indicted at the time of the passage of the Hepburn Act. He said:

The defendant's counsel argues that as by section 10 all laws in conflict with the provisions of the Hepburn Act are repealed by it, and as the amendments provided for in that act shall not affect causes "now pending" in the courts of the United States, therefore no prosecutions could be brought under the Elkins Act after the Hepburn Act was passed, that the saving clause only saved cases then pending, and that in any subsequent prosecutions the indictment must allege that the defendants did the acts alleged to be criminal knowingly. The thirteenth section of the United States Revised Statutes (U. S. Comp. St., 1901, p. 6) reads as follows:

"SEC. 13. *Repeals not to affect liabilities unless, etc.*—The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

This section changes the rule of the common law by providing that the repeal of any statute shall not have the effect to release or extinguish any liability incurred under such statute unless the repealing act shall so expressly provide. It is claimed that this provision is not applicable to this case, because the Hepburn Act has a specific saving clause of its own, and, as by the tenth section of the Hepburn Act causes now pending only are explicitly saved, it follows that that

clause takes the place of the general provisions concerning repeal in section 13 of the United States Revised Statutes. The question whether it does or does not must be admitted to be a nice one, but in my opinion section 13 of the United States Revised Statutes applies. Its provisions are general, applying to all subsequent legislation of Congress. It provides that the repeal of any statute shall not extinguish any liability incurred under it unless the repealing act shall so expressly provide. Section 10 of the Hepburn Act does not expressly provide that the repeal of the Elkins Act shall release or extinguish criminal liability incurred under said statute, and therefore, in my opinion, section 13 of the Revised Statutes applies.

This view has been reached by Judge Landis, of Chicago, in the case of U. S. v. Standard Oil Company (D. C.), 148 Fed. Rep., 719, decided January 3, 1907, and by Judge Morris in the case of United States v. Chicago, etc., Railway Company and others (D. C.), 151 Fed., 84, in an opinion handed down late in January, 1907. In this case Judge Lochren, who is stated in a memorandum at the end of the opinion to have sat with Judge Morris at the hearing of these demurrers, but to have taken no part in this decision, expresses a contrary view. In both of these decisions much reliance is placed upon the case of Lang v. U. S., 133 Fed., 201, 66 C. C. A., 255. This case arose under a different statute, but presented, it seems to me, the same identical question. In that case Judge Barker held that section 13 of the United States Revised Statutes applied, notwithstanding a similar saving clause. Judge Grosscup concurred in his decision upon a different ground, while Judge Jenkins dissented. The questions involved are very elaborately argued in these opinions, and I shall simply say that, with great respect for the distinguished judges who differ from them, I concur with the views of Judges Landis, Morris, and Barker. I can not believe that it was the intention of Congress that parties who had committed offenses under the Elkins Act should be discharged from all liability because indictments had not been filed at the time the Hepburn Act was passed while others, no more morally guilty, should be continued to be prosecuted under indictments found before that act was passed.

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I think that if that was the intention of Congress it would have said so. Section 13 of the United States Revised Statutes provides that the repeal of any statute shall not release any penalty or liability incurred under it unless the repealing act shall expressly so provide. The repealing act in this case did not so expressly provide. The best argument that can be made in support of the repeal is that it impliedly so provided. But in my opinion, since section 13 was adopted there can be no repeal by implication in such a case.

My conclusion is that the demurrer should be overruled.

UNITED STATES v. STANDARD OIL COMPANY (148 FED. REP., 719, 722).

Judge Landis, in overruling demurrers in the above-entitled case, in the course of his opinion had the following to say with respect to the proper construction of section 10 of the Hepburn Act:

This brings us to what the court esteems to be the real question involved in the pending controversy. For the United States it is conceded that under common-law rules of construction the repeal of a penal statute operates to wipe out all offenses against such repealed law, unless there is a statutory provision expressly authorizing their future prosecution. But it is denied that the act of June 29th repealed section 1 of the Elkins law, and it is maintained that, even if it were so repealed, offenses against the Elkins law are kept alive for future prosecution by section 13 of the Revised Statutes, enacted in 1871 [U. S. Comp. St. 1901, p. 6], which provides:

"The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

This law has been attacked here as an unwarranted attempt by the Congress that enacted it to curtail the authority of

succeeding Congresses by limiting in advance the effect to be given to their enactments. Now, under our Constitution, each Congress is the equal, in point of power, of any predecessor or successor. Therefore no Congress has authority to draw in the boundaries of the legislative domain to the embarrassment of any other Congress. But, as I read section 13, this is not attempted. It is rather the substitution of a new rule to be observed by the courts in the construction of statutes thereafter to be enacted. It seems to me that such new rule is no more an impairment of the legislative power of succeeding Congresses than was the previously existing common-law rule an impairment of the power of preceding Congresses. That Congress had the constitutional power to make the change is plain. That any succeeding Congress may abrogate the new rule and restore the old rule is equally plain. That, until such old rule is restored, each succeeding Congress intends that the courts shall be guided by the new rule in giving effect to their enactments, seems to me beyond question.

But for the defendant it is urged that section 10 of the rate law contains a provision which expresses the intention of the Congress that enacted that section to pardon all offenders against the repealed Elkins law, except as to those offenses upon which indictments had been returned prior to June 29, 1906, the date of the approval of the rate law. The language of section 10 (34 Stat., 595) is:

"That all laws and parts of laws in conflict with the provisions of this act are hereby repealed, but the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law."

The contention of the defendant is that this provision was the enactment by Congress of its own saving clause, and that, therefore, section 13 cannot be held to apply here, because of the common-law rule providing that:

"Specific provisions in a statute relating to a particular subject must govern in respect to that subject as against general provisions in other parts of the law which might otherwise be broad enough to include it."

The theory upon which the defendant insists this rule should control is stated in *State* v. *Showers* (34 Kans., 269, 8 Pac., 474), relied upon by defendant, as follows:

"The question as to what should be repealed and what saved was before the legislature. It had the entire subject-matter thereof under consideration, and evidently intended to cover the entire ground; and evidently intended that nothing should be repealed except what it expressly repealed, and that nothing should be saved except what it expressly stated should be saved. It expressly saved some things; therefore, it must be inferred that it intended to save no others."

The defendant further maintains that the substance of the saving clause in section 10 respecting "causes now pending" was fully embraced within section 13; that, presumably, the Congress that enacted section 10 was familiar with section 13, and it is argued that to apply section 13 here, as authorizing the prosecution of an offense upon which an indictment had not been returned prior to June 29th, and which was, therefore, not a pending cause when the rate law became operative, would be to deny to the saving clause in section 10 any effect whatever; the defendant's position being that that clause, by saving only pending causes, exhibits the will of Congress to extinguish all other offenses.

Of course this court will not assume that Congress enacted section 10 in ignorance of section 13. On the contrary, it will be presumed that they were familiar with that section, and it must also be presumed that they knew what meaning had been given to it and to another saving clause like unto the one in section 10 when, in the case of *Lang* v. *United States* (133 Fed., 201, 66 C. C. A., 255), decided two years before section 10 was adopted, the Circuit Court of Appeals of this circuit was appealed to by a convicted man to release him from imprisonment for the same reason urged by defendant against the indictments in the pending controversy. There, as here, the indictment was returned after the repeal of the law which the defendant was accused of having violated. The repealing statute contained the following so-called special saving clause:

"Nothing contained in this act shall affect any prosecution or other proceeding, criminal or civil, begun under any exist

ing act hereby amended, but such prosecution or other proceeding, criminal or civil, shall proceed as if this act had not been passed.

"All acts and parts of acts inconsistent with this act are hereby repealed."

It was argued that, inasmuch as this clause specifically authorized the future prosecution of "proceedings begun," Congress must be presumed to have thereby expressed its intention that nothing else should be prosecuted. The court, however, affirmed the judgment of conviction, each member of the court writing a separate opinion, Judge Jenkins dissenting from the judgment of the majority. Judge Grosscup, writing for affirmance, construed the special saving clause as if it read "proceedings heretofore begun or hereafter to be begun." He says:

"It was not the purpose of Congress in the employment of the word 'begun' in the connection here used to provide that there should be no prosecutions under the old statute unless they had been already begun. Congress presumably was looking to the future as well as the past. It meant that in the matter of importations of this character there should be no interim of noncriminality. The amendatory statute only enlarged and tightened the preceding statute. No prosecutions could be based on the amendatory statute for acts done prior to its enactment; what Congress meant in the section preserving the right to prosecute under the statute was that no prosecutions begun under that statute, whether they were then pending or should thereafter be brought, should lapse by reason of this effort to enlarge and tighten the hold of the Government upon this class of importations. It is to carry out this purpose that the word 'begun' is employed, merely as a connective to identify a prosecution pending or to be brought with the statute under which it is brought."

Concurring with Judge Grosscup, Judge Baker held that section 13 was not "an attempt to tie the hands of succeeding Congresses," but rather a command to "the courts to treat a repealed statute as still remaining in force for punishment of violations, unless the courts shall find that the repealing statute expressly provides that such repealed act shall not sustain any prosecution for its violation;" that therefore section 13 applied, inasmuch as the special saving clause

was silent respecting "the fate of those unconvicted violators of the original act against whom prosecutions had not been begun by March 3, 1903" (that being the date of the repealing act).

He further says:

"If section 13 is in force in its entirety, it is the court's duty to apply the rule of interpretation therein laid down and to treat the repealed act as being alive for the purpose of sustaining any proper prosecution for the enforcement of its penalties, unless the amendatory and enlarging act be found to contain an express provision for the forgiveness of the unconvicted. There is no pretense that the repealing act expressly so provides."

In harmony with the defendant's contention before me, and in line with the ruling in *State* v. *Showers*, 34 Kan., 269, 8 Pac., 474 (cited by the defendant here), Judge Jenkins holds that the phrase "proceedings begun" means prosecutions begun at the time the repealing act was passed, and that the propositions laid down by the majority of the court are opposed to those common-law rules of construction for which the defendant contends here. Speaking of *United States* v. *Reisinger* (128 U. S., 398, 9 Sup. Ct., 99, 32 L. Ed., 480), respecting the effect of which there has been much debate here, he says:

"The case of *United States* v. *Reisinger* is relied upon by the Government to sustain this prosecution, but it is readily distinguishable from the case in hand. There the proviso to the act is to the effect that the rights of parties 'shall not be abridged or affected as to contracts in pending cases,' but there was no proviso with reference to criminal prosecutions for offenses committed under the repealed act. The Supreme Court ruled that the question whether the prosecution of offenses was saved was determined by general statute (section 13), and because the legislature had not spoken in the new act to the question of offenses committed under the old act evidenced clearly an intention that with respect to that subject the general statute should control. The act saved contracts in pending causes because there was no general statute of construction which would save them, and rights would have been lost by the repeal except for the proviso."

It will be noted that in distinguishing the *Reisinger case* from the *Lang case* Judge Jenkins assumes that in the former case the Supreme Court was dealing with a saving clause without the inclusion of which in the repealing act "contract rights would have been lost." In this, however, he appears to have been under a misapprehension, as is conceded here by counsel for the defendant, for, quoting from their brief:

"With those contracts the repealed law had no concern. They were not forbidden by the law repealed. They were entered into in the exercise of the valid contract rights of the parties."

This erroneous assumption by the dissenting opinion (which opinion the Standard Oil Company maintains states the true rule) would seem to deprive that opinion of the authoritative weight to which the great name of its author would otherwise entitle it.

As I read this case, the question presented to the Court of Appeals was precisely the question here. And, while the construction Judge Grosscup placed upon the special saving clause can not be given to the clause found in section 10, the judgment of the court (which is most important) and the reasoning of Judge Baker are diametrically opposed to the position of the defendant in the pending cause and to the Kansas case and other authorities relied upon by the defendant. Furthermore, the general trend of Judge Grosscup's reasoning is indicative of a strong indisposition on his part to countenance extinguishment by implication.

It is the duty of the court to enforce the will of Congress as expressed in the written enactment. In the ascertainment of that will, I am not at liberty to ignore the ultimate object of the law. That object was the establishment of uniform railroad rates, reasonable in amount. The former law had failed to accomplish this, and was therefore strengthened. Instead of being wiped off the books as having served its purpose, additional and severe liabilities were created, and more drastic remedies and penalties authorized. For the offense with which the defendant stands charged, the preceding Elkins law prescribed punishment only by fine. The view entertained by the present Congress respecting this

offense finds expression in the provision authorizing the additional penality of imprisonment in the penitentiary. And the court is asked to hold that this same Congress deliberately intended to pardon all unindicted prior offenders, whose conduct it was, more than all other causes combined, that moved Congress to enact the rigid and far-reaching measure of June 29th.

My opinion is that whereas, at common law, the repeal of a penal statute extinguished all penalties for offenses against its provisions in the absence of an express saving clause, under section 13 the repeal of a penal statute extinguishes no such penalties in the absence of an express extinguishing clause, which the rate law does not contain; that the so-called "saving clause" in section 10 was inserted for the purpose of definitely prescribing the rule of procedure that should control the prosecution of causes then pending in various stages in the courts, thus avoiding the confusion and controversy which, as experience has shown, must otherwise have resulted. For, had Congress not enacted that "the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law," the new procedure of the rate law would probably have controlled steps thereafter taken in such pending cases.

I reach this conclusion for the following reasons: In the first place, it is inconceivable that the Congress of the United States, while addressing themselves to the task of drafting a law the great object of which was to secure to all men fair treatment in respect of the transportation of property on the basis of absolute equality, could possibly have gotten into such a frame of mind that they would divide all prior offenders into two classes, and say that those who had been indicted should be punished, and those who, up to that time, had avoided the grand jury should be pardoned. For Congress to do such a thing would be both absurd and unjust. In the second place, the saving clause is just such a provision as would have been drawn by a lawyer who had examined section 13 and desired to relieve the courts of unnecessary controversy growing out of ques-

tions of procedure. And, in the third place, in the light of the affirmance of Lang's conviction, it is not such a provision as would have been drawn by any lawyer whose purpose was to insure the pardon of violators of the law.

It is necessary to add, only, that in the court's opinion an indictment for violation of the Elkins law need not allege that the published rate is a reasonable rate. And without needlessly (as it seems to me) extending this review of the questions raised, it is my opinion that such an indictment need not set out in full the carrier's tariffs; that, with the exception of Nos. 3716 and 3722, the indictments sufficiently aver what the published rates were; and that the defendant's property was transported at the preferential rate; that the allegation that a certain named rate was in force between designated points, as shown by the published tariffs, necessarily carries with it its own negative that any other lawful rate was in force between the same points at the same time. The demurrers to indictments Nos. 3715, 3717, 3718, 3719, 3720, 3721, 3723, and 3724 are therefore overruled.

In the indictments Nos. 3716 and 3722 it is alleged that there was a common arrangement between several carriers for the transportation of property over their roads having a continuous line from Whiting, Ind., to southern points; that the lowest total rate for the transportation of petroleum products, as shown by the printed tariff schedules of the several carriers, was 39½ cents per hundred pounds; and that the product of the Standard Oil Company was transported between the designated points for $25\frac{9}{10}$ cents per hundred pounds. These indictments are bad, for the reason that the allegation that the lowest total rate was 39½ cents implies that amount to be the sum of the several local rates in force on the respective roads, and does not negative the existence of a joint through rate lower than the total of the locals. The demurrers to indictments Nos. 3716 and 3722 are therefore sustained.

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GREAT NORTHERN RAILWAY COMPANY *v.* UNITED STATES.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 491. Argued January 7, 1908.—Decided February 24, 1908.

The provisions of § 13, Rev. Stat., that the repeal of any statute shall not have the effect to release or extinguish any penalty incurred under the statute repealed, are to be treated as if incorporated in, and as a part of, subsequent enactments of Congress, and, under the general principle of construction requiring effect to be given to all parts of a law, that section must be enforced as forming part of such subsequent enactments except in those instances where, either by express declaration or necessary implication such enforcement would nullify the legislative intent.

The act of Congress of June 29, 1906, c. 359, 34 Stat. 584, known as the Hepburn law, as construed in the light of § 13, Rev. Stat., as it must be construed, did not repeal the act of February 19, 1903, c. 708, 32 Stat. 847, known as the Elkins law, so as to deprive the Government of the right to prosecute for violations of the Elkins law committed prior to the enactment of the Hepburn law; nor when so construed does the Hepburn law under the doctrine of *inclusio unius exclusio alterius* exclude the right of the Government to prosecute for past offenses not then pending in the courts because pending causes are enumerated in, and saved by, § 10 of the Hepburn law.

In citing approvingly, as to the particular point involved in this case, cases recently decided in the lower Federal courts, this court expresses no opinion upon any other subjects involved in such cases, and does not even indirectly leave room for any implication that any opinion has been expressed as to such other issues which may hereafter come before it for decision.

Although a ground for demurrer to indictment may be sufficiently broad to embrace a contention raised before this court, if it appears that such contention was disclaimed, and was not urged, in the trial court and in the Circuit Court of Appeals, and was not referred to in any of the opinions below or in the petition for certiorari or the brief in support thereof, this court, will, without intimating any opinion in regard to its merits, decline to consider it.

155 Fed. Rep. 945, affirmed.

THE facts are stated in the opinion.

Mr. William R. Begg for petitioner:

(1) The indictment herein does not charge an offense under

§ 1 of the act of February 19, 1903 (the Elkins law), because it fails to allege that the concessions from tariff were either willfully or knowingly granted.

The indictment charges petitioner and the individual defendants jointly, with one and the same offense. The individual defendants could be guilty only of the offense defined in the third sentence of § 1.

The indictment charges only that petitioner and the other defendants unlawfully granted the concessions. Concessions from tariff granted under mistake are unlawful. *Railway Co.* v. *Mugg*, 202 U. S. 242; *Railway Co.* v. *Hefley*, 158 U. S. 98; *Railway Co.* v. *Harrison*, 119 Alabama, 539; *S. C.*, 24 So. Rep. 552.

The last half of the second sentence of § 1 makes any concession, however made, unlawful. Criminal intent must be necessary to convert this unlawful act into a crime. The concession, to be a crime, must be either knowingly or willfully granted. If a criminal intent is necessary to the crime, it must be charged in the indictment. *United States* v. *Carll*, 105 U. S. 611, 612; *Evans* v. *United States*, 153 U. S. 584, 587; *Armour Packing Co.* v. *United States*, 153 Fed. Rep. 1, 23, 24.

It is only by virtue of the Elkins law that the corporation may be guilty of the crime. *Commission* v. *Railway Co.*, 145 U. S. 263, 281; *United States* v. *Hanley*, 71 Fed. Rep. 672, 674, 676.

(2) That part of § 1 of the Elkins law, which defined the crimes charged in the indictment and prescribed punishment therefor, had been before the indictment was returned, repealed by § 2 of the act of June 29, 1906, commonly known as the Hepburn act.

The prosecution claims that under the Elkins law it was not necessary that to be a crime the concession from tariff be knowingly granted, and the indictment here involved does not charge a concession knowingly granted. Under the amendment made by the Hepburn act the departure, to be criminal, must be knowingly made, and the indictment must so allege. The element of scienter is injected.

The punishment is changed. Under the Elkins law the only

punishment prescribed was a fine. Under the amendment the punishment is a fine and also imprisonment for not to exceed two years, of other than corporate offenders.

Such radical changes in the ingredients of the crime and in the punishment therefor necessarily under the decisions of this and other courts, work the repeal of the part of the Elkins law above quoted. *Norris* v. *Crocker*, 13 How. 429, 439; *United States* v. *Tynen*, 11 Wall. 88, 92; *United States* v. *Claflin*, 97 U. S. 546, 550, 552; *United States* v. *Fisher*, 109 U. S. 143, 145; *Bank* v. *United States*, 107 U. S. 445; *District of Col.* v. *Hutton*, 143 U. S. 18, 26; *People* v. *Tisdale*, 57 California, 104, 106; *Telegraph Co.* v. *Brown*, 8 N. E. Rep. 171, 172; *Lindsey* v. *State*, 5 So. Rep. 99, 100; *State* v. *Allen*, 44 Pac. Rep. 121, 122; *State* v. *Ingersoll*, 17 Wisconsin, 651, 655; *Mullen* v. *People*, 31 Illinois, 444, 445; *Mongeon* v. *People*, 55 N. Y. 613, 615; *State* v. *Massey* (N. C.), 4 L. R. A. 308, 311; *Wharton* v. *State*, 5 Coldw. 1; *S. C.*, 94 Am. Dec. 214; *State* v. *Smith*, 62 Minnesota, 540; 2 Lewis' Sutherland Stat. Constr. 482.

The rule that the repeal and simultaneous reënactment, literally or substantially, of a statute, continues it, has no application to the case at bar. This court, as well as others, has rejected the rule where the reënactment is a complete revision of and substitute for the earlier statute. *Murdock* v. *Memphis*, 20 Wall. 590, 616; *Pana* v. *Bowler*, 107 U. S. 529, 538; *Murphy* v. *Utter*, 186 U. S. 95, 104, 105; *Tracy* v. *Tuffly*, 134 U. S. 206, 223; *Bank* v. *United States*, 107 U. S. 445; *Red Rock* v. *Henry*, 106 U. S. 596; *The Paquete Habana*, 175 U. S. 677, 685; *State* v. *King*, 12 La. Ann. 593, 594; *Coffin* v. *Rich*, 45 Maine, 507, 512, 513; *Goodno* v. *Oshkosh*, 31 Wisconsin, 127, 129; *Wilson* v. *Railway Co.*, 29 Pac. Rep. 869.

The rule cannot apply to the case at bar because there is no substantial reënactment of the earlier law.

The Circuit Court of Appeals applied the rule on the authority of *Steamship Co.* v. *Joliffe*, 2 Wall. 450, 458; *Irrigation Co.* v. *Garland*, 164 U. S. 1; *Campbell* v. *California*, 200 U. S. 87; *Lamb* v. *Powder Co.*, 65 C. C. A. 570; *Wright* v. *Oakley*, 5 Metc.

(Mass.) 400; *Association* v. *Benshimol*, 130 Massachusetts, 325; *St. Louis* v. *Alexander*, 23 Missouri, 483; *Ely* v. *Holton*, 15 N. Y. 595; *Anding* v. *Levy*, 57 Mississippi, 51; *Fullerton* v. *Spring*, 3 Wisconsin, 588; *Glentz* v. *State*, 38 Wisconsin, 549; *Burwell* v. *Tullis*, 12 Minnesota, 572; *Gaston* v. *Merriam*, 33 Minnesota, 271; *State* v. *Baldwin*, 45 Connecticut, 134; *People* v. *Board*, 20 Colorado, 220; *Moore* v. *Kenockee*, 75 Michigan, 332; *Capron* v. *Strout*, 11 Nevada, 304; *McMullen* v. *Guest*, 6 Texas, 275; *Holden* v. *State*, 137 U. S. 483; *Commonwealth* v. *Herrick*, 6 Cush. 465; *State* v. *Gumber*, 37 Wisconsin, 298; *State* v. *Wish*, 15 Nebraska, 448; *State* v. *Miller*, 58 Indiana, 399; *Sage* v. *State*, 127 Indiana, 15; *State* v. *Kates*, 149 Indiana, 46; *State* v. *Herzog*, 25 Minnesota, 490; *State* v. *Prouty*, 115 Iowa, 657; *State* v. *Williams*, 117 N. Car. 753; *State* v. *Brewer*, 22 La. Ann. 273; *Territory* v. *Ruval*, 84 Pac. Rep. (Ariz.) 1096; *Junction City* v. *Webb*, 44 Kansas, 71.

Of the cases cited the first eighteen in the list involved private rights, and the remaining thirteen liability to punishments under statutes claimed to have been repealed. All the cases, except *St. Louis* v. *Alexander; Moore* v. *Kenockee; Capron* v. *Strout*, and *McMullen* v. *Guest*, support the abstract rule. It seems to us that none of them support the court's application of it.

The part of the Elkins law, applicable to this case, necessarily ceased to exist at the instant the Hepburn act took effect, because two repugnant laws covering the same subject matter cannot coexist; and also because that part of the Elkins law was omitted from the reënactment and a new and different provision substituted.

The repeal of the part of the Elkins law quoted was complete.

The Elkins law was repealed at least as to all concessions from tariff granted or received, whether knowingly or not, by others than corporations. The act or crime of the officer or agent alone constitutes an act or crime of the corporation. To hold that the Elkins law remains in force only as to the corporation is to penalize it, and through it innocent stock-

holders, while permitting the guilty officer to escape. Congress cannot have intended this.

The repeal cannot be severed. The part of the Hepburn act quoted in connection with § 10, repealed *in toto* the part of the Elkins law quoted. *Goodno* v. *Oshkosh*, 31 Wisconsin, 127, 130.

Congress, by § 10, of the Hepburn act, has manifested its intent that only penalties and forfeitures incurred under the repealed parts of the Elkins law for which prosecutions were pending at the date of the passage of the Hepburn act should be saved, and that penalties and forfeitures for which prosecutions had not at that date been instituted should be remitted.

By § 13, Rev. Stat., in the absence of a special saving clause in the repealing act all penalties previously incurred under the act repealed are saved. *United States* v. *Reisinger*, 128 U. S. 398; *Lang* v. *United States*, 133 Fed. Rep. 204; *People* v. *England*, 91 Hun, 152; *State* v. *Smith*, 62 Minnesota, 540, 543; *Kleckner* v. *Turk*, 63 N. W. Rep. 469.

In the absence of a statute to the contrary, where the repealing act saves rights accrued and penalties incurred under the previous law and at the same time modifies the procedure by which the right is to be enforced or the penalty recovered, the procedure in an action or prosecution to enforce the right or recover the penalty must be in accordance with the later act. *Railway Co.* v. *Grant*, 98 U. S. 398; *Railroad Co.* v. *Oglesby*, 76 N. E. Rep. 165, 166; *Taylor* v. *Strayer*, 78 N. E. Rep. 236, 238; *Palmer* v. *City of Danville*, 46 N. E. Rep. 629; *Holcomb* v. *Boynton*, 37 N. E. Rep. 1031.

Section 10 can have no effect other than to save penalties, forfeitures and liabilities incurred under the repealed laws, because a statute affecting substantial rights is usually construed to have only a prospective operation.

The word "causes" as used in the section includes criminal cases. *Blyew* v. *United States*, 13 Wall. 581, 591; *Erwin* v. *United States*, 37 Fed. Rep. 471, 479; *Taylor* v. *United States*, 45 Fed. Rep. 531, 539; *State* v. *Hancock* (N. J.), 24 Atl. Rep. 726, 728.

Section 13 is ineffectual to prevent the courts from giving effect by their decrees to the intent of a subsequent Congress, as that intent may be discovered from the subsequent enactment.

The judiciary is an independent department. To construe the law is of the essence of its duty. Cases cited *supra* and *Ableman* v. *Booth*, 21 How. 506, 520; *Gordon* v. *United States*, 117 U. S. 697; *United States* v. *Klein*, 13 Wall. 128, 147; *Marbury* v. *Madison*, 1 Cranch, 137, 176; *District of Columbia* v. *Hutton*, 143 U. S. 18, 27; *United States* v. *Claflin*, 97 U. S. 546, 548; *Powell* v. *Pennsylvania*, 127 U. S. 678, 697.

The Attorney General and *Mr. Milton D. Purdy*, Assistant to the Attorney General, for respondent:

The concluding portion of § 10 of the Hepburn act was intended by Congress to preserve existing methods of procedure with respect to causes pending in courts of the United States at the time of the passage of the act, and it should not be construed as extinguishing penalties, forfeitures and liabilities which had accrued under the old law but were not then before the courts for judicial determination.

Section 10 of the Hepburn act must be read in connection with § 13 of the Revised Statutes, which is "a law prescribing rules for the construction of acts and resolutions of Congress." *United States* v. *Reisinger*, 128 U. S. 398; *United States* v. *Barr*, 4 Sawyer, 254; *United States* v. *Ulrici*, 3 Dillon, 532; *United States* v. *Four Cases of Lastings*, 10 Benedict, 371; *Sims* v. *United States*, 121 Fed. Rep. 515. Combining the two the result would be as follows: "That all laws and parts of laws in conflict with the provisions of this act are hereby repealed, but this repeal shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under said laws, and such laws shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability, but the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall

be prosecuted to a conclusion in the manner heretofore provided by law."

The only implication to be drawn from the language employed is that all causes then pending before the Interstate Commerce Commission, together with all rights of action not then initiated under the old law, shall be proceeded with in accordance with the modified procedure provided for by the new law. This is shown by the history of the enactment, of the causes which led to its adoption and a consideration of the law itself in its entirety.

The debates in Congress while this law was under consideration were perhaps the most notable in recent years, especially in the Senate, and it is worthy of note that at no time was the idea expressed or even suggested that penalties, forfeitures and liabilities which had accrued under the old law, but which were not pending before the courts for determination, should be extinguished. Neither was it intimated that the old law forbidding rebating was considered or thought to be harsh or unjust in any particular. On the contrary, the one dominating idea seems to have been that the old law should be strengthened, and that at least, with respect to individuals offending against that law, the court should be empowered to punish by imprisonment in addition to the imposition of a fine.

In fact, there is abundant reason for claiming that the Congress considered the old law as not sufficiently "drastic" to put a stop to those practices which apparently had been going on in utter defiance of the Elkins act.

To sustain the petitioners' contention the doctrine of repeal by implication must be invoked and applied. The rule of law that repeals by implication are not favored is so well recognized by the courts as to render a citation of authorities unnecessary. If, therefore, it is possible to construe the language employed in § 10 of the Hepburn law in such a manner as to avoid the implication that § 13, Rev. Stat., has been repealed in so far as it would operate to save penalties, forfeitures, and liabilities which had accrued at the time this law

was passed, it would certainly be the duty of the courts to adopt such a construction.

MR. JUSTICE WHITE delivered the opinion of the court.

The act of Congress, commonly referred to as the Hepburn law, was enacted June 29, 1906. 34 Stat., chap. 3591, p. 584. In November, 1906, in a District Court of the United States for Minnesota, the Great Northern Railway Company and several of its officials were indicted for violations of the act of February 19, 1903, commonly known as the Elkins act. 32 Stat., chap. 708, p. 847. There were fifteen counts, all relating to acts done in May, June, July and August, 1905. Except as to varying dates of shipment and the sum of the concessions, the counts were alike. A reference to the first count will therefore make clear all the charges which the indictment embraced. After alleging the corporate existence of the railway company, the capacity of its named officials and agents and the fixing and publishing of rates, there was set out the carriage of certain grain by the railway company from Minneapolis, Minnesota, to Seattle, Washington, for account of the W. P. Devereux Company, a corporation. It was then alleged that by the tariff and schedule of rates as established, published and filed in conformity to the act to regulate commerce the legal charge was fifty cents for each one hundred pounds of grain carried from Minneapolis to Seattle, "but the grand jurors aforesaid, on their oath aforesaid, do present and charge that . . . within the jurisdiction of this court, . . . the said Great Northern Railway" (and the officers and agents named) "did unlawfully grant and give to the said W. P. Devereux Company . . . a concession of twenty cents (20c.) of the said rate as aforesaid upon every one hundred pounds of the property so transported . . . as aforesaid, whereby the said property was by said corporation common carrier transported in said interstate commerce . . . at a less compensation and rate than that named therefor in said tariff and schedules so as aforesaid

published and filed by the said common carrier and in force at the time upon its said route."

The indictment was demurred to by all the accused upon the following grounds:

"1. That neither the said indictment nor any count in the said indictment stated sufficient facts or grounds to constitute against the said defendants, or either of them, an offense against the laws of the United States, nor any offense.

"2. That the statute of the United States creating the offense or offenses pretended to be charged in the said indictment, and under which said indictment was found, was duly repealed and was not in force at the time when the said indictment was found."

The demurrer in this case was evidently heard along with demurrers in cases against others presumed to present like questions. The demurrer was overruled for reasons stated in an opinion, deemed controlling not only of this but also of the other cases. *Sub nomine United States* v. *Chicago, St. P., M. & O. Ry. Co.*, 151 Fed. Rep. 84. By consent there was a severance between the railway company and the individual defendants. On the trial, after the jury had been sworn and when the taking of testimony was about to begin, the bill of exceptions states that the counsel for the company declared that he desired, on behalf of the defendant, "in order to save our rights under the law questions involved, to make objection to the introduction of any evidence. And I desire to have it understood and agreed between the Government and the defendant that I may now enter this objection with the same force and effect as if a witness had been already called and sworn to testify on behalf of the Government." On this being assented to by the Government, objection was made to the introduction of any evidence based upon the two grounds which had been previously urged to support the demurrer. The following occurred:

"The COURT: I understand that last ground. Let us see the first ground.

"Mr. BROWN: The first ground is the general ground of the insufficiency of the indictment. The second is the same thing, only more specific.

"I think the objection will be sufficient if confined to the first one.

"The COURT: The point that you wish to make is that there can be no prosecution here, no matter what the evidence is, because of the repeal of this Elkins act by the Hepburn act.

"Mr. BROWN: That is right.

"The COURT: The objection will be overruled.

"Mr. BROWN: I would ask an exception to the ruling of the court.

"The COURT: An exception is allowed."

Thereupon the counsel for the company stated that there was an agreement with the Government that the company should make an admission as to the facts alleged in the indictment, subject to the right of the company to make "such objections and motions and to take such action, either in this court or upon appeal, as shall be deemed necessary and proper to have determined the question of the sufficiency of the indictment to state an offense, and the sufficiency of the facts admitted to state an offense; and it is further agreed that neither such admissions, nor the fact that they had been made in this trial, shall be used as evidence or otherwise upon any other trial of this case, or upon the trial of any case." To this the prosecution assented. The establishment and publication of the tariff rates, the shipments of grain as alleged in the indictment, etc., were then admitted by the accused, and it was further admitted as follows:

"That in case of the several shipments specified in the several counts of the indictment herein the concessions stated in the several counts respectively in the said indictment were given to W. P. Devereux Company by the direction and with the consent of the said defendant, the Great Northern Railroad Company."

Both parties then rested. The company requested an in-

struction in its favor, based on the grounds upon which it had demurred, for which it had objected to any evidence, and upon the additional ground "that the facts shown by the evidence are not sufficient to constitute against the defendant any offense against the laws of the United States, nor any offense." Upon this request the following colloquy between the court and the counsel occurred:

"The COURT: You admit all the material facts alleged in the indictment?

"Mr. BROWN: We do.

"The COURT: And practically admit that they are proved?

"Mr. BROWN: We can't say that. We admit the facts that are stated here—the Government has gone over—and I understand they are the facts of the indictment.

"The COURT: For the purposes of this case, we will say that you admit those facts.

"The motion will be denied, and an exception allowed the defendant."

The court then instructed the jury, as follows:

"The defendant has admitted by its counsel that all the material allegations of the several counts are true, and if you do not believe these allegations are proven you are obliged to find the defendant not guilty. I suppose it is proper for the court to say that it can hardly see how you can find any other verdict than that of guilty, but that is for you to say. If you do not believe these allegations are proven you can find the defendant not guilty."

An exception was allowed the defendant to that part of the charge instructing that if the facts stated in the indictment were believed to be true, that the defendant should be found guilty. The following then occurred:

"The COURT: That is equivalent to saying that the indictment itself is insufficient.

"MR. BROWN: Might I have that exception?

"The COURT: You may.

"Mr. BROWN: May I have it appear on the record that the

grounds of my exception are the same three grounds named as the basis of my motion to instruct a verdict, to wit:

"1. That neither the indictment, on which this prosecution is based, nor any count in the said indictment, states sufficient facts or grounds to constitute against the defendant an offense against the laws of the United States, nor any offense;

"2. That the statute, or statutes, of the United States creating the offense or offenses, pretended to be charged in the indictment, and in each count thereof, and upon which statutes the said indictment and each count thereof is based, had been duly repealed and were not in force, as to any of the offenses in the said indictment pretended to be charged, at the time when the said indictment was found;

"3. On the ground that the facts shown by the evidence are not sufficient to constitute against the defendant an offense against the laws of the United States, nor any offense.

"The COURT: You may."

There was a verdict of guilty, and the grounds upon which the exceptions previously taken had been rested were made the basis for a motion in arrest, which was overruled and excepted to. From the verdict and sentence thereon the case was taken to the Circuit Court of Appeals for the Eighth Circuit, where the judgment was affirmed (155 Fed. Rep. 945), and the case is here because of the allowance of a writ of certiorari.

There is a contention in the brief of counsel for the petitioner, that the demurrer to the indictment should have been sustained and that the motion to arrest as well as the exceptions to the charge should have prevailed, because the indictment in all its counts was insufficient to state an offense under the Elkins act, even if that act had not been repealed or modified by the Hepburn law.

We postpone presently determining whether this contention is open on the record, or, if open, is meritorious, in order to come at once to the important question for decision, which is:

1. Did the Hepburn law repeal the Elkins act so as to deprive the Government of the right to prosecute for violations of the Elkins act committed before the Hepburn law was passed? The conflicting contentions on these subjects are these: It is insisted on behalf of the railway company that the Elkins act was amended and reënacted by § 2 of the Hepburn law, and that thereby a repeal of the Elkins act was accomplished, and that the express terms of the Hepburn law manifest the intention of Congress that no offense theretofore committed against the Elkins act should be prosecuted, unless a prosecution was then pending. The Government whilst not challenging the doctrine that where a criminal statute is repealed and a right to prosecute for a prior offense is not saved, such right is extinguished, yet insists that the principle has no application to this case, because the reënactment of the Elkins act by § 2 of the Hepburn law did not amount to a repeal of the Elkins act to the extent of preventing prosecutions for offenses against that act committed prior to the adoption of the Hepburn law. And it is urged that this result is demonstrated not only by the clause of the Hepburn law reënacting the Elkins act, but also by other provisions of the Hepburn law interpreted in the light of the principles of construction which are made applicable by operation of the general law, that is, Rev. Stat. § 13.

In considering these contentions in their ultimate aspect it is clear that to dispose of them requires us, in any event, to interpret the Hepburn law and to determine how far the reenactment by that law of the provisions of the Elkins act operates to prevent prosecutions for offenses committed prior to the date when the Hepburn law was enacted. We come therefore at once to that question. In doing so, to disembarrass the analysis from what may be an irrelevant and certainly a confusing consideration, we concede for the sake of argument only that the effect of the amendment and reenactment of the Elkins act by § 2 of the Hepburn law was to repeal the Elkins act, and in the light of this concession we

propose to determine whether the right to prosecute for any prior offense committed before the going into effect of the Hepburn law was lost by reason of the adoption of that law.

We must read the Hepburn law in the light of § 13 of the Revised Statutes, which provides as follows:

"SEC. 13. The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

This provision but embodies § 4 of the act approved February 25, 1871, c. 71, 16 Stat. 431, which was entitled "An Act prescribing the Form of the enacting and resolving Clauses of Acts and Resolutions of Congress, and rules for the construction thereof." As the section of the Revised Statutes in question has only the force of a statute, its provisions cannot justify a disregard of the will of Congress as manifested either expressly or by necessary implication in a subsequent enactment. But while this is true the provisions of § 13 are to be treated as if incorporated in and as a part of subsequent enactments, and therefore under the general principles of construction requiring, if possible, that effect be given to all the parts of a law the section must be enforced unless either by express declaration or necessary implication, arising from the terms of the law, as a whole, it results that the legislative mind will be set at naught by giving effect to the provisions of § 13. For the sake of brevity we do not stop to refer to the many cases from state courts of last resort dealing with the operation of general state statutes like unto § 13, Rev. Stat., because we think the views just stated are obvious and their correctness is established by a prior decision of this court concerning that section. *United States* v. *Reisinger*, 128 U. S. 398.

The Hepburn law is entitled "An Act to amend an Act entitled 'An Act to regulate commerce,' approved Febru-

ary fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof and to enlarge the powers of the Interstate Commerce Commission." The law is comprehensive. It undoubtedly, as we have said, in the second section, amends and reënacts the Elkins act and enlarges in important particulars the powers of the Interstate Commerce Commission, and changes the procedure in various ways essential to the conduct of controversies before the commission. Besides, the act in some respects modifies the means of enforcing the orders of the commission in the courts of the United States, the right of appeal, the judgment as to costs, attorneys' fees, etc. The crucial portion of the act, for the purposes of the present inquiry, is § 10, which provides: "That all laws and parts of laws in conflict with the provisions of this act are hereby repealed, but the amendments herein provided for shall not affect causes now pending in the courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law."

Clearly, the mere repeal of conflicting laws is in no way repugnant to the provisions of § 13 of the Revised Statutes, and, therefore, standing alone, leaves no room for contending that the enactment of the Hepburn law destroyed the effect of § 13. The difficulty of construction, if any, arises from the words following the general repealing clause: "but the amendments herein provided for shall not affect causes now pending in the courts of the United States, but such causes shall be prosecuted to conclusion in the manner heretofore provided by law." These words, we think, do not, expressly or by fair implication, conflict with the general rule established by § 13, Rev. Stat., since by their very terms they are concerned with the application to proceedings pending in the courts of the United States of the new methods of procedure created by the Hepburn law. Any other construction would necessitate expunging the words "shall be prosecuted to a conclusion in the manner heretofore provided by law." This follows, because if it were to be held that the intent and object of the

lawmaker in dealing with cases "pending in the courts of the United States," was solely to depart as to all but such pending cases from the general rule of Rev. Stat. § 13, then the provision as to future proceedings would be unnecessary, because the old and unrepealed as well as the newly enacted remedies would be applicable, as far as pertinent, to such pending causes. The provision commanding that the new remedies should not be applicable to causes then pending in the courts of the United States gives significance to the whole clause and serves to make clear the fact that the legislative mind was concerned with the confusion and uncertainty which might be begotten from applying the new remedies to causes then pending in the courts, and demonstrates therefore that this subject, and this subject alone, was the matter with which the provision in question was intended to deal. In other words, when the object contemplated by the provision is accurately fixed the subject is freed from difficulty, and not only the letter but the spirit of the provision becomes clear; that is to say, it but manifests the purpose of Congress to leave cases pending in the courts to be prosecuted under the prior remedies, thus causing the new remedies created to be applicable to all controversies not at the time of the passage of the act pending in the courts. And all the arguments relied upon to sustain the theory that the power to prosecute for past offenses not then pending in the courts was abrogated by the Hepburn law rest in substance upon the disregard of the true significance of the provision of § 10. Thus the argument that by the application of the elementary rule by which the inclusion of one must be considered as the exclusion of the other, it follows that the power to further prosecute all but cases then pending in the courts was destroyed by the Hepburn law, because pending causes are enumerated in § 10, and are hence not saved by Rev. Stat. § 13, simply assumes that the provision of § 10 was intended to save the right to further prosecute the cases then pending in the courts, and disregards the fact that the provision as to pending causes was solely addressed to the remedies to

be applied in the future carrying on of such cases. Again, the contention that unless the provision as to pending causes in § 10 be construed as relating to the further right to prosecute such cases, it becomes meaningless, but overlooks the fact that the purpose of the provision was, by express enactment, to prevent the application of the new remedies to the causes then pending in the courts of the United States, a result which would not necessarily have followed without the direction in question.

The purpose of Congress in enacting § 10 is aptly illustrated by previous legislation concerning the reënactment of the Interstate Commerce Law, and may well have been deemed to be advisable in consequence of the decision of this court in *Missouri Pacific Railway* v. *United States*, 189 U. S. 274. The construction which we have given § 10, resulting from its plain language, is fortified by a consideration of the context of the Hepburn law. Thus conceding for the sake of argument that the word "pending cases," as used in § 10, embraces criminal prosecutions, it clearly also relates to civil controversies. Now, § 16 of the prior act to regulate commerce, as amended and reënacted by § 5 of the Hepburn law, prescribes a limitation of two years "from the time the cause of action accrues" as to "all complaints for the recovery of damages" before the commission, and establishes a limitation of one year for the filing of a petition in the Circuit Court for the enforcement of an order of the commission for the payment of money. But the section contains a proviso saving the right to present claims accrued prior to the passage of the act, provided the petition be filed within one year. If it were true that § 10 abrogated, as asserted, the right to prosecute all claims not pending in the courts at the time of the passage of the Hepburn law, it would follow that that law destroyed the very rights which it specifically provides should be saved if prosecuted within a year. Moreover, as the clause of § 10 which is relied upon in terms embraces only cases pending in the courts of the United States, it would follow, if the contention here made were true, that the

Hepburn law, while saving pending cases in the courts, yet destroyed all claims pending at the time of the passage of that act before the commission. As no reason is suggested why, if the purpose of § 10 was to save pending causes, that section should have destroyed the right to further prosecute all causes pending before the commission, it would seem that the inclusion in § 10, only of causes pending in courts of the United States, could only have been the result of a purpose on the part of Congress not to distinguish without reason between pending causes by saving one class and destroying the other, but was solely based on the desire of Congress not to interfere with proceedings then pending in the courts, but to leave such proceedings to be carried to a finality, in accordance with the remedies existing at the time of their initiation. There are various other provisions of the Hepburn law which we think additionally irresistibly demonstrate the correctness of the construction which we affix to § 10, but we do not, for the sake of brevity, refer to them, as we think the reasoning hitherto stated adequately shows the unsoundness of the proposition that that section manifests in any respect the intention of Congress to depart from the general principle expressed in Rev. Stat. § 13. We say, however, that the view we have taken has in various forms of statement been upheld by a line of decisions in the lower Federal courts. *United States* v. *Standard Oil Company*, 148 Fed. Rep. 719; *United States* v. *Chicago, St. P., M. & O. Railway Company et al.*, 151 Fed. Rep. 84; *United States* v. *Delaware, Lackawanna & Western Railway Company*, 152 Fed. Rep. 269; *United States* v. *New York Central & Hudson River Railroad Company*, 153 Fed. Rep. 630. In citing the cases in question we do not wish to be considered as implying that we express any opinion as to the doctrines which they may announce upon other subjects than the one now before us. We say this, because it may be that some of the other subjects with which some of the cited cases deal may hereafter come before us for decision, and therefore we prefer not prematurely, even by indirection, to leave room

for the slightest implication that we express an opinion as to such other issues.

2. This brings us to the contention which we at the outset passed over, which is that the indictment was insufficient to state an offense under the Elkins act, although that act was not repealed. The proposition is, that as the indictment only charged that the concessions on the established rate were unlawfully given, it was insufficient because in order to cause a concession to be a crime under the Elkins act, as it stood before the Hepburn law, such concession must have been "either knowingly or willfully granted. If a criminal intent is necessary to the crime, it must be charged in the indictment." It is undoubted that the first ground of the demurrer filed to the indictment was broad enough to embrace this contention if it had been urged. That it was not urged on the hearing of the demurrer persuasively results from the fact that it was not noticed in the elaborate opinion filed by the court in disposing of the demurrer. It moreover results from the proceedings had at the trial after the jury was sworn. The judge who presided at that trial was the same judge before whom the demurrer was heard. When in stating the objection to the admissibility of any evidence on the part of the Government, the counsel for the accused restated both grounds, as expressed in the demurrer, the only contention which the court understood to be urged was the repeal of the Elkins act, since the court said: "I understand that last ground" (the one referring to the repeal of the Elkins act). "Let us see the first ground." It is clear that the counsel did not then consider that the first ground embraced the proposition now made, since in answer to the question of the court he said: "The first ground is the general ground of the insufficiency of the indictment. The second is the same thing, only more specific." That the court understood this declaration as indicating that the only question raised was the repeal of the Elkins act, beyond controversy appears from the statement then made by the court: "The point you wish to make is that there can be no prosecution

here, no matter what the evidence is, because of the repeal of the Elkins act by the Hepburn act." To which counsel answered: "That is right." True also is it that the general language of the exceptions subsequently taken are also broad enough to embrace the point now made, but consistently with that candor and directness of conduct which we should attribute to counsel, and which we do attribute, we cannot consider that the subsequent exceptions were intended by counsel, without notice to the court, to embrace a contention which had been expressly disclaimed and which could not be in the case consistently with the previous statement of counsel as to the one and sole point which they desired to raise. And this conclusion is moreover rendered necessary by the nature of the admission made, which expressly conceded that "the concessions stated in the several counts respectively in the said indictment were given . . . by the direction and with the consent of the said defendant, the Great Northern Railway Company." And particularly is this so in view of the express declaration made by counsel to the court after his admission as to the facts of the case, viz.: "I understand that they [the admissions] are the facts of the indictment." In addition to this not a syllable in the elaborate opinion of the Circuit Court of Appeals refers to the question now urged. On the contrary, that opinion contains affirmative statements by the court concerning concessions made by counsel for both parties in argument which exclude the possibility that the contention we are considering was ever directly urged or even indirectly called to the attention of that court. Finally, in the petition filed for certiorari, counsel, after stating the bringing of the indictment, the demurrer, the admissions and the exceptions made at the trial, summed up and precisely stated all the contentions which arose from the demurrer and the exceptions without a single reference to the point now relied upon, and that point was not referred to or noticed in the brief submitted in support of the petition for certiorari. Certain is it that the proposition now urged, in view of the admission made below, is of a purely

technical character. Because we decline to consider the contention under the circumstances stated, we must not be understood as intimating any opinion whatever upon it. Into that question we have not deemed that we are called upon to enter.

Affirmed.